

Gesetzentwurf der Bundesregierung
Entwurf eines Dreizehnten Gesetzes zur Änderung des Außenwirtschaftsgesetzes und der Außenwirtschaftsverordnung
Drucksache 16/10730

Öffentliche Anhörung, 26. Januar 2009, 14:00 bis 16:30 Uhr, Berlin

Stellungnahme zum Anhörungsgegenstand

Zusammenfassung

- ? Die deutsche Wirtschaft gehört zu den größten Investoren und Kapitalempfängern weltweit und nimmt eine Spitzenposition bei der Offenheit für ausländische Investitionen ein. Die Gesetzesinitiative wendet sich theoretischen Risiken zu, für deren mögliches Eintreten es weder in Deutschland noch im Ausland konkrete Hinweise gibt.
- ? Eine Beschränkung der Offenheit ist wirtschaftlich nicht wünschenswert. Eine Kontrolle von Auslandsinvestitionen aus politischen Erwägungen ist vertretbar, wenn sie alleine dem Schutz der öffentlichen Ordnung und Sicherheit dient und im Einklang mit internationalen Standards und dem EU-Recht steht.
- ? Der vorliegende Entwurf eines Dreizehnten Gesetzes zur Änderung des Außenwirtschaftsgesetzes und der Außenwirtschaftsverordnung entspricht im Wesentlichen und mit einigen Ausnahmen diesen Kriterien.
- ? Der vorgesehene Kontrollmechanismus ist mit Ausnahme der unten genannten Anmerkungen im internationalen Vergleich angemessen.
- ? Im Einzelnen erscheinen Verbesserungen des geplanten Prüfprozesses unter anderem in folgenden Bereichen möglich (weitere Vorschläge s.u.):
 - Dauer des Prüfprozesses (§ 53 Abs. 2 Satz 4 AWV-RegE): Begrenzung der Einleitung und des Prüfprozesses auf je einen Monat.
 - Unbedenklichkeitsfiktion (§ 53 Abs. 2 AWV-RegE): Klare Regelung einer Ausschlussfrist und Untersagung nur nach Unterrichtung oder Anordnung bzw. Untersagung innerhalb der Fristen des § 53 Abs.1 und 2 AWV-RegE, die auf je einen Monat verkürzt werden sollten.
 - Rückabwicklung (§ 31 Abs. 3 AWG-RegE, § 53 Abs. 4 AWV-RegE): Untersagung nicht in Form einer Rückabwicklung, sondern durch Einschränkung der Ausübung von Stimmrechten, deren Übertragung an einen Treuhänder oder Anordnung der Veräußerung binnen bestimmter Frist.
 - Unbedenklichkeitsbescheinigung (§ 53 Abs. 3 AWV-RegE): Klarstellung im Gesetz, dass im Wege eines Vorprüfverfahrens auch vor Abschluss einer Erwerbsvereinbarung eine Unbedenklichkeitsbescheinigung erteilt werden kann.
 - Prüfkriterium (AWG §7 Absatz 2 Nummer 6): Präzisierung des Prüfkriteriums „öffentliche Ordnung oder Sicherheit“ durch Festlegung von Regelbeispielen oder Anzeichen, bei deren Vorliegen grundsätzlich ein Prüfverfahren eingeleitet wird.
 - Verschwiegenheitspflicht: Ergänzung einer Regelung der Verschwiegenheitspflicht der beteiligten Institutionen und Personen.
 - Zusammenwirken mit anderen Prüfverfahren: Vermeidung von Doppelprüfungen durch Klarstellung des Zusammenwirkens des geplanten Prüfverfahrens mit anderen Verfahren, bspw. bankaufsichtsrechtliche Prüfung.
- ? Der Prüfprozess wird sich in der Praxis bewähren müssen, indem die Bundesregierung einer engen Auslegung des Kriteriums folgt, ausschließlich sicherheitsrelevante Transaktionen prüft, und protektionistischen Versuchungen einer Nutzung des Prozesses für wirtschaftliche oder politische Zwecke widersteht.

I. Auslandsinvestitionen: Lage und wirtschaftspolitische Prioritäten

- ? Deutschland nimmt bislang eine Spitzenposition im internationalen Kapitalverkehr ein:
- Mit EUR 204 Mrd. an Portfolioinvestitionen und EUR 124 Mrd. an Direktinvestitionen im Ausland gehören deutsche Investoren zu den 4 größten Direktinvestoren weltweit, hinter den USA, Großbritannien und Frankreich.
 - Mit EUR 268 Mrd. an Portfolioinvestitionen und EUR 38 Mrd. an Direktinvestitionen ausländischer Investoren ist Deutschland ein wichtiger Investitionsstandort, wird jedoch als deutlich weniger attraktiv wahrgenommen als beispielsweise die USA, Großbritannien, Kanada, die Niederlande, China, Spanien und Russland, und rangiert im internationalen Vergleich lediglich auf Platz neun der Direktinvestitionsziele.
- ? Objektiv gehört Deutschland mit Blick auf Auslandsinvestitionen zu den liberalsten Märkten weltweit:
- Deutschland nimmt im Offenheitsindex der OECD Platz 3 von 52 beobachteten Industrie- und Schwellenländern ein, hinter Lettland und Belgien und vor den anderen EU-Staaten und den USA.
 - Die im internationalen Vergleich geringe Attraktivität als Investitionsziel geht nicht auf Markteintrittsbarrieren zurück, sondern wird von ausländischen Unternehmen und Investoren mit den heimischen Rahmenbedingungen für Unternehmen in Verbindung gebracht. Beispielhaft hierfür sind die nach wie vor als unattraktiv empfundenen Bedingungen bei Besteuerung, Lohn- und Sozialabgaben sowie eine hohe Regulierungs- und Bürokratiedichte.
- ? Die wirtschaftlichen Vorteile ausländischer Investitionen im Inland sind weithin anerkannt:
- stärkerer Wettbewerb,
 - höhere Innovationsanreize,
 - mehr Beschäftigung,
 - bessere Versorgung für Konsumenten.
- ? Einschränkungen des Kapitalverkehrs
- verringern die o.g. Vorteile,
 - bergen die Gefahr einer Nutzung mit protektionistischen Motiven, und
 - können zu Vergeltungsmaßnahmen betroffener Drittstaaten (Retorsion) und letztlich zu destruktiven Protektionsspiralen führen.
- ? Deutschland hat daher ein starkes wirtschaftliches Interesse an
- freien internationalen Kapital- und Investitionsströmen,
 - einer Steigerung der Attraktivität Deutschlands als Investitionsstandort für ausländische Unternehmen und Investoren und
 - einem Abbau von Kapitalverkehrsbeschränkungen auf internationaler Ebene.
- ? Sollte aus politischen Erwägungen eine Kontrolle ausländischer Investitionen in Deutschland angestrebt werden, sollte diese



- ausschließlich dem Schutz der öffentlichen Ordnung und Sicherheit dienen und nur in diesem Sinne in der Praxis angewendet werden,
- den etablierten Standards der OECD genügen und Nicht-Diskriminierung, Transparenz und eine fortschreitende, unilaterale Liberalisierung sicherstellen,
- im Einklang mit bestehendem nationalem und internationalem Recht und Standards, insbesondere dem EU-Recht, stehen und
- anhand im Vorhinein bekannter Prüfkriterien erfolgen.

II. Änderung des AWG: Grundlegende Einschätzung des Entwurfs

- ? Der vorliegende Entwurf eines Dreizehnten Gesetzes zur Änderung des Außenwirtschaftsgesetzes und der Außenwirtschaftsverordnung (Drucksache 16/10730, „Entwurf“) steht im Wesentlichen und mit Ausnahme der unten genannten Anmerkungen im Einklang mit den oben genannten Kriterien.
- ? Die auf politischer Ebene wahrgenommenen potenziellen Risiken in Verbindung mit ausländischen Investitionen in Deutschland – für deren mögliches Eintreten es weder in Deutschland noch im Ausland konkrete Hinweise gibt – voraussetzend und mit Ausnahme der unten genannten Anmerkungen stellt der Entwurf eine angemessene Maßnahme dar.
- ? Verglichen mit Kontrollprozessen, wie sie in anderen Staaten existieren, mit denen Deutschland im Standortwettbewerb liegt, ist der im Entwurf für Deutschland vorgesehene Kontrollmechanismus mit Ausnahme der unten genannten Anmerkungen als angemessener Mittelweg zwischen Schutzpotenzial hinsichtlich öffentlicher Ordnung und Sicherheit einerseits und den notwendigen Anforderungen an Transparenz, Proportionalität, Liberalisierung und Nicht-Diskriminierung andererseits einzustufen. Zum Vergleich:
 - Der kürzlich neu gefasste CFIUS-Prozess in den USA ist deutlich komplizierter und formalisierter, erfordert einen erheblichen Berichtsaufwand seitens der investierenden Unternehmen im Ausland und erstreckt sich auf alle Investitionen mit potenziellen Auswirkungen auf öffentliche Ordnung und Sicherheit, auch solche, die nicht zu einem kontrollierenden Anteil am Zielunternehmen führen.
 - Die Einspruchsmöglichkeiten der Regierung in Großbritannien sind zwar äußerst gering formalisiert, wenig bürokratisch und wurden bislang – ein nicht zu unterschätzendes Signal aus Sicht internationaler Investoren – nie in Anspruch genommen, vor allem nicht für protektionistische Zwecke. Allerdings ist kein transparenter und systematischer Entscheidungsprozess definiert, was im Fall einer Anwendung die Rechtsunsicherheit zulasten der Investoren erhöhen dürfte.
 - Der in Frankreich definierte Prüfprozess umfasst auch Transaktionen, die nicht zu kontrollierenden Anteilen am Zielunternehmen führen, und ist mit Blick auf die Reaktionsfähigkeit des Staates auf eine fest definierte Liste kritischer Sektoren beschränkt. Eine *ex ante* Festlegung auf strategische Sektoren schränkt den Handlungsrahmen des Staates ein – sicherheitsgefährdende Transaktionen außerhalb der definierten Sektoren können nicht geprüft und gegebenenfalls untersagt werden – und führen zu Anreizverzerrungen in der heimischen Industrie – eingeschränkter Wettbewerb in den geschützten Branchen, Resignation in den übrigen.

- In Australien werden nicht nur solche Transaktionen vom Prüfprozess erfasst, die potenziell die öffentliche Ordnung und Sicherheit gefährden, sondern auch solche, die den wirtschaftlichen Plänen der Regierung und den unternehmerischen Interessen in der Wirtschaft entgegenstehen. Dies birgt die Gefahr wirtschaftlichen Protektionismus.
 - Noch extremer fällt ein Vergleich mit Schwellenländern wie China oder Russland aus, in denen Prüfprozesse sehr offensichtlich protektionistischen Zwecken dienen und zudem noch durch segregierende regulatorische Anforderungen im Heimatmarkt verschärft werden. Beide Länder werden von der OECD daher auf den hintersten Plätzen des Indizes für Investitions-offenheit geführt.
 - Die beiliegende Studie „*Sovereign wealth funds and investment policies*“, Deutsche Bank Research, September 2008, enthält eine ausführliche vergleichende Analyse der existierenden Prüfprozesse für Auslands-investitionen in den wichtigsten Volkswirtschaften weltweit.
- ? Eine Verabschiedung des Entwurfes erscheint daher wirtschaftspolitisch insgesamt vertretbar, vorbehaltlich der unten genannten Anmerkungen.

III. Reputationseffekte und Standortwettbewerb

- ? Auch wenn der Entwurf einen im internationalen Vergleich angemessenen Prüfprozess vorsieht, hat dieser und die politische Diskussion in den vergangenen Monaten bereits zu Reputationsschäden im Ausland geführt:
- Die politische Diskussion in Deutschland wurde vereinzelt unter protektionistischen und populistischen Vorzeichen geführt.
 - Die Bundesregierung hatte es versäumt, den Entwurf frühzeitig adäquat im Ausland bei Regierungen und Investoren zu „verkaufen“, das heißt nicht nur, die geplanten Maßnahmen zu erklären, sondern auch die resultierenden Vorteile nicht zuletzt gegenüber Kontrollmechanismen in anderen Staaten aufzuzeigen.
 - In anderen Staaten, mit denen Deutschland im Standortwettbewerb steht, wurde die Gelegenheit genutzt, den Entwurf als ein weiteres Indiz für latenten Protektionismus in Deutschland anzuprangern und damit Investoren aus Drittstaaten entsprechend zu irritieren.
- ? Deutsche Unternehmen stehen – gerade dieser Tage – in einem intensiven Wettbewerb um Investitionen und Kapital – auch aus dem Ausland. Viele Unternehmen sind auf ausländische Investitionen dringend angewiesen.
- ? Sollte der Entwurf angenommen werden, erscheint es daher als äußerst sinnvoll,
- den Prüfprozess ausländischen Regierungen und Investoren systematisch zu erklären und dessen Anwendungsbereich und Vorteile aufzuzeigen und
 - mittelfristig an einer Verbesserung der wirtschaftspolitischen Rahmenbedingungen für ausländische Investoren mit Nachdruck zu arbeiten.
- ? Sollte der Entwurf dagegen scheitern – beispielsweise einer EU-Normenkontrolle nicht standhalten –, so könnte dies ebenfalls der Reputation des Investitionsstandorts Deutschland schaden.



IV. Anmerkungen zum Entwurf im Einzelnen

? Dauer des Prüfprozesses

- Vor dem Hintergrund der bereits etablierten Prüfung eines ausländischen Erwerbs von Anteilen an Unternehmen in den Bereichen Rüstungsgüter und Kryptosysteme im Hinblick auf wesentliche Sicherheitsinteressen der Bundesrepublik Deutschland (§ 7 Abs. 1 Nr. 1 und Abs. 2 Nr. 5 AWG in Verbindung mit § 52 AWW und nach § 10 Abs. 1 SatDSiG) sollte dem Aspekt der Rechts- und Planungssicherheit für betroffene Investoren noch größere Aufmerksamkeit geschenkt werden.
- So wurde gegenüber dem ersten Referentenentwurf des Bundesministeriums für Wirtschaft und Technologie (BMWi) vom Oktober 2007 die Entscheidungsfrist von einem auf zwei Monate verlängert (§ 53 Abs. 2 Satz 4 AWW-RegE). Damit hat sich auch die Dauer der Planungsunsicherheit erhöht, was für einen Investor – zum Beispiel bei der Finanzplanung für den Beteiligungserwerb – mit zusätzlichen Kosten verbunden ist und – gerade in Zeiten unsicherer Finanzmärkte – das Zustandekommen des Erwerbs gefährdet.
- Im Rahmen der vorgenannten etablierten Prüfung eines ausländischen Erwerbs nach § 52 AWW muss ein Erwerber dem BMWi Beteiligungen ab 25% der Stimmrechte melden. Bereits innerhalb eines Monats nach Eingang der vollständigen Unterlagen beim Ministerium erlangt er jedoch Rechtssicherheit, wie die Beteiligung bewertet wird. Demgegenüber wäre bei der nun vorgesehenen zweistufigen sektorübergreifenden Prüfung nach § 53 AWW-RegE mit einer Verfahrensdauer von fünf Monaten zu rechnen: So wird die Meldepflicht durch eine dreimonatige Frist zur Einleitung eines Prüfverfahrens, beginnend ab dem Beteiligungserwerb, ersetzt (§ 53 Abs. 1 Satz 1 AWW-RegE). Hinzu tritt eine zweimonatige Entscheidungsfrist nach Eingang der vollständigen Unterlagen des Erwerbers (§ 53 Abs. 2 Satz 4 AWW-RegE).
- Um die Belastungen (höhere Kosten durch Planungs- und Rechtsunsicherheit) der betroffenen Unternehmen zu reduzieren und die internationale Wettbewerbsfähigkeit des Standortes Deutschland zu bewahren, erscheint es daher angezeigt, die Fristen in beiden Stufen des Prüfverfahrens deutlich zu verkürzen. So ist beispielsweise das US-amerikanische „CFIUS-Verfahren“ in der Regel auf eine 30-tägige Prüfphase begrenzt. Zudem hat der Gesetzgeber bei der nicht weniger bedeutsam erscheinenden Prüfung eines ausländischen Erwerbs in den Bereichen Rüstung und Kryptosysteme im Hinblick auf wesentliche Sicherheitsinteressen der Bundesrepublik Deutschland eine Entscheidungsfrist von einem Monat als angemessen erachtet.
- Vor diesem Hintergrund scheinen folgende Fristen angemessen und ausreichend: Einleitung des Prüfverfahrens (§ 53 Abs. 1 Satz 1 AWW-RegE): ein Monat. Entscheidung durch das Ministerium (§ 53 Abs. 2 Satz 4 AWW-RegE): ein Monat.
- Verzögerungen des Prozesses können sich zusätzlich aus dem Übergang zwischen der Einleitung des Prüfverfahrens und dem Verfahren selbst ergeben. Eine sinnvolle Ergänzung von § 53 Abs. 2 Satz 4 AWW-RegE wäre: „Die Prüfung beginnt am Tag des Eingangs der für die Prüfung materiell relevanten Unterlagen. Das Ministerium für Wirtschaft und Technologie kann während der Prüfung weitere Unterlagen im Rahmen der in der Bekanntmachung im Bundesanzeiger gestellten Anforderungen vom Erwerber einfordern.“

? Öffentliches Angebot

- Zur Klarstellung sollte in § 53 Abs. 1 Satz 1 zweiter Halbsatz A WV-RegE nicht von „öffentlichem Angebot“, sondern von „Angebot im Sinne von § 2 Abs. 1 des Wertpapiererwerbs- und Übernahmegesetzes“ gesprochen werden.

? Regelung einer Unbedenklichkeitsfiktion

- Wir regen an, in § 53 Abs. 2 A WV-RegE in Anlehnung an § 40 Abs. 2 Satz 2 GWB ausdrücklich zu regeln, dass dem Erwerb keine Bedenken entgegenstehen, wenn das BMWi innerhalb der von uns vorgeschlagenen Prüffrist von einem Monat dem Erwerber keine Untersagung oder Anordnung zugestellt hat.
- Dabei sollte die Unsicherheit hinsichtlich der „Vollständigkeit“ der Unterlagen durch eine Pflicht zur Nachforderung von Unterlagen innerhalb der Prüfungsfrist vermieden werden.
- Dementsprechend wäre nach § 53 Abs. 1 Satz 5 A WV-RegE folgender neuer Satz 6 einzufügen (wobei die vorstehend vorgeschlagene Verkürzung der Entscheidungsfrist auf einen Monat nachfolgend unterstellt wird): „Wird die Untersagung oder Anordnung nicht innerhalb von einem Monat nach Eingang der vollständigen Unterlagen zugestellt, gilt der Erwerb als unbedenklich im Hinblick auf die öffentliche Ordnung oder Sicherheit der Bundesrepublik Deutschland. Die eingereichten Unterlagen gelten als vollständig, wenn das Bundesministerium für Wirtschaft und Technologie nicht vor Ablauf eines Monats nach erfolgtem Eingang weitere Unterlagen anfordert.“
- Um sicherzustellen, dass für alle gebietsfremden Investoren Zustellungen im Inland ohne weiteres möglich sind, sollte ein Erwerber verpflichtet werden, einen Zustellungsbevollmächtigten im Inland zu benennen.

? Rückabwicklung

- Hinsichtlich der Rechtsfolgen kann – insbesondere angesichts der Prüfungs- und Entscheidungsfristen des RegE – eine Rückabwicklung eines vollzogenen Erwerbs (§ 31 Abs. 3 A WG-RegE, § 53 Abs. 4 A WV-RegE) mit erheblichen Schwierigkeiten und Kosten verbunden sein.
- Denkbar erschiene stattdessen die Untersagung der Ausübung von Stimmrechten, deren Übertragung an einen Treuhänder sowie die Anordnung der Veräußerung binnen einer bestimmten Frist nach dem Vorbild des § 2c KWG (bedeutende Beteiligungen an einem Kreditinstitut). Dies würde insbesondere das Rückabwicklungsrisiko für Veräußerer vermeiden.

? Unbedenklichkeitsbescheinigung

- Sachgerecht erscheint es, dass das BMWi einem gebietsfremden Investor auf Antrag eine Unbedenklichkeitsbescheinigung erteilen kann, dass dem Beteiligungserwerb keine nationalen Sicherheitsinteressen entgegenstehen. Bereits im Wortlaut des § 53 Abs. 3 A WV sollte jedoch klargelegt werden, dass – wie in der Begründung ausgeführt – Investoren auch einen geplanten Beteiligungserwerb, das heißt vor Abschluss des schuldrechtlichen Vertrags oder der Veröffentlichung des Übernahmeangebots, auf seine Unbedenklichkeit hin überprüfen lassen können. Die Möglichkeit, eine Unbedenklichkeitsbescheinigung zu beantragen, sollte zudem auch für deutsche Unternehmen gelten, die sich um gebietsfremde Investoren bemühen.

- § 53 Abs. 3 AWW-RegE könnte insoweit wie folgt ergänzt werden: „Auf Antrag eines Erwerbers, der auch vor Abschluss des schuldrechtlichen Vertrages über den Erwerb der Stimmrechte gestellt werden kann, wird das Bundesministerium für Wirtschaft und Technologie eine Bescheinigung erteilen, wenn dem Erwerb keine Bedenken im Hinblick auf die öffentliche Ordnung oder Sicherheit der Bundesrepublik Deutschland entgegenstehen.“
- Ferner sollte das Ministerium auch bei der Ausübung dieses „Vorprüfverfahrens“ an kurze Fristen – also einen Monat für die Prüfung seitens des Ministeriums – gebunden werden. Hierdurch wäre gewährleistet, dass die betroffenen Investoren in einem für sie kalkulierbaren Zeitraum Rechts- und Planungssicherheit erlangen können.

? Prüfkriterium der Gefährdung der öffentlichen Ordnung und Sicherheit

- Trotz der Klarstellung in AWG §7 Absatz 2 Nummer 5, dass es sich um eine „[...] tatsächliche und hinreichend schwere Gefährdung [...]“ handeln muss, die „[...] ein Grundinteresse der Gesellschaft berührt [...]“, birgt die generelle Formulierung des Prüfkriteriums einer Gefährdung der öffentlichen Ordnung und Sicherheit deutliche Risiken bei der Auslegung in der Praxis. Dies verunsichert Investoren und birgt die Gefahr, dass die Untersagungsmöglichkeit in stärkerem Maße zu einem Investitionshemmnis wird als dies nach den nur höchst ausnahmsweise vorliegenden Eingriffsvoraussetzungen der Fall sein dürfte.
- Ausgehend davon, dass eine solch allgemeine Formulierung im Gesetz politisch beabsichtigt ist, wäre es für die tägliche Praxis jedoch hilfreich, konkreter auszulegen, gegebenenfalls außerhalb der AWW in Form eines Runderlasses, in welchen Fällen überhaupt eine Prüfung denkbar erscheint. Ansonsten droht die Gefahr, dass das Ministerium routinemäßig Voranfragen zu einer AWW-Freigabe erhält. Dies ist ausweislich der Begründung des RegE zu Artikel 1 Nr. 3 nicht beabsichtigt.
- Mit solchen Klarstellungen der Verwaltungspraxis wurden in anderen Bereichen bereits gute Erfahrungen gemacht, vgl. z.B. den Emittentenleitfaden der BaFin. Denkbar wäre eine dezidierte Liste von Kriterien, die eine Gefährdung der öffentlichen Ordnung und Sicherheit anzeigen.

? Verschwiegenheitspflicht

- Im Hinblick auf die regelmäßig gegebene besondere Vertraulichkeit der zu übermittelnden Unterlagen, insbesondere, wenn diese bereits vor Abschluss des schuldrechtlichen Vertrages über den Erwerb der Stimmrechte vorgelegt werden, wird vorgeschlagen, eine an § 9 WpÜG angelehnte Verschwiegenheitspflicht in einem neuen § 54 AWW einzufügen.
- Diese könnte wie folgt lauten: „§ 54 Verschwiegenheitspflicht (1) Die bei dem Bundesministerium für Wirtschaft und Technologie Beschäftigten dürfen ihnen bei ihrer Tätigkeit nach §§ 52 und 53 bekannt gewordene Tatsachen, deren Geheimhaltung im Interesse eines nach diesem Gesetz Verpflichteten oder eines Dritten liegt, insbesondere Geschäfts- und Betriebsgeheimnisse sowie personenbezogene Daten, auch nach Beendigung ihres Dienstverhältnisses oder ihrer Tätigkeit nicht unbefugt offenbaren oder verwerten. Dies gilt auch für andere Personen, die durch dienstliche Berichterstattung Kenntnis von den in Satz 1 bezeichneten Tatsachen erhalten. Ein unbefugtes Offenbaren oder Verwerten im Sinne des Satzes 1 liegt insbesondere nicht vor, wenn Tatsachen weitergegeben werden an: 1. Strafverfolgungsbehörden oder für



Straf- und Bußgeldsachen zuständige Gerichte. 2. Stellen, die kraft Gesetzes oder im öffentlichen Auftrag mit der Bekämpfung von Wettbewerbsbeschränkungen, der Überwachung von Angeboten zum Erwerb von Wertpapieren oder der Überwachung von Börsen oder anderen Wertpapier- oder Derivatemärkten, des Wertpapier- oder Derivatehandels, von Kreditinstituten, Finanzdienstleistungsinstituten, Investmentgesellschaften, Finanzunternehmen oder Versicherungsunternehmen betraut sind sowie von solchen Stellen beauftragte Personen, soweit die Tatsachen für die Erfüllung der Aufgaben dieser Stellen oder Personen erforderlich sind. Für die bei den in Satz 3 genannten Stellen Beschäftigten oder von ihnen beauftragten Personen gilt die Verschwiegenheitspflicht nach den Sätzen 1 bis 3 entsprechend. An eine ausländische Stelle dürfen die Tatsachen nur weitergegeben werden, wenn diese Stelle und die von ihr beauftragten Personen einer den Sätzen 1 bis 3 entsprechenden Verschwiegenheitspflicht unterliegen. (2) Die §§ 93, 97, 105 Abs. 1, § 111 Abs. 5 in Verbindung mit § 105 Abs. 1 sowie § 116 Abs. 1 der Abgabenordnung gelten nicht für die in Abs. 1 Satz 1 und 2 bezeichneten Personen, soweit sie zur Durchführung dieses Gesetzes tätig werden. Sie finden Anwendung, soweit die Finanzbehörden die Kenntnisse für die Durchführung eines Verfahrens wegen einer Steuerstraftat sowie eines damit zusammenhängenden Besteuerungsverfahrens benötigen, an deren Verfolgung ein zwingendes öffentliches Interesse besteht und nicht Tatsachen betroffen sind, die den in Abs. 1 Satz 1 oder 2 bezeichneten Personen durch eine Stelle eines anderen Staates im Sinne von Abs. 1 Satz 3 Nr. 2 oder durch von dieser Stelle beauftragte Personen mitgeteilt worden sind.“

? Zusammenwirken mit anderen Prüfverfahren

- Schließlich weisen wir darauf hin, dass die geplante Prüfung eines Beteiligungserwerbs von gebietsfremden Investoren in Einzelfällen sich mit der bankaufsichtsrechtlichen Prüfung einer beabsichtigten Beteiligung an einem Kreditinstitut überschneiden kann.
- Mit dem Gesetz zur Umsetzung der Beteiligungsrichtlinie (2007/44/EG) werden die EU-Vorgaben zu Verfahrensregeln und Bewertungskriterien für die aufsichtsrechtliche Beurteilung des Erwerbs und der Erhöhung von Beteiligungen an Unternehmen des Finanzsektors in nationales Recht umgesetzt werden. Ein zentraler Regelungsbereich betrifft die Beurteilung der Zuverlässigkeit potenzieller Erwerber. Hiernach soll die Bundesanstalt für Finanzdienstleistungsaufsicht einen Erwerb unter anderem auch dann untersagen können, wenn Tatsachen die Annahme rechtfertigen, dass dieser im Zusammenhang mit Geldwäsche oder Terrorismusfinanzierung steht.
- Nach der Rechtsprechung des Europäischen Gerichtshofs können die EU-Mitgliedstaaten aus Gründen der öffentlichen Ordnung oder Sicherheit im Sinne des Art. 58 EG-Vertrags auch Maßnahmen zur Bekämpfung rechtswidriger Taten, wie unter anderem der Geldwäsche und Terrorismusfinanzierung, treffen.
- Um „Doppelprüfungen“ zu vermeiden, sollte klargestellt werden, in welchem Verhältnis die beiden Prüfverfahren zueinander stehen. Ähnlich wie beispielsweise bei der Immissionsschutzrechtlichen Genehmigung nach § 13 BImSchG wäre denkbar, dass das jeweils speziellere Verfahren (hier: nach 2 c KWG) das allgemeinere nach AWG/AWV einschließt.

V. Umsetzung in der Praxis

- ? Die internationale Erfahrung mit Prüfprozessen für Auslandsinvestitionen legt nahe, dass neben der Gestalt eines Prüfprozesses gemäß Gesetzesvorlage die Anwendung des Prozesses in der Praxis einen ebenso hohen Stellenwert für die Wettbewerbsfähigkeit eines Wirtschaftsstandortes hat.
- ? Von entscheidender Bedeutung hierbei ist die Auslegung des Kriteriums einer Gefährdung der öffentlichen Ordnung und Sicherheit. In Zukunft wird sich der Prüfprozess bewähren müssen, indem die Bundesregierung einer engen Auslegung des Kriteriums folgt, ausschließlich sicherheitsrelevante Transaktionen prüft, und protektionistischen Versuchungen einer Nutzung des Prozesses für wirtschaftliche oder politische Zwecke widersteht.
 - Trotz der Klarstellung in AWG § 7 Absatz 2 Nummer 5, dass es sich um eine „[...] tatsächliche und hinreichend schwere Gefährdung [...]“ handeln muss, die „[...] ein Grundinteresse der Gesellschaft berührt [...]“, birgt eine solch generelle Formulierung der Prüfkriterien deutliche Risiken bei der Auslegung in der Praxis.
 - Protektionistischer Missbrauch des Prozesses würde erhebliche Reputationsrisiken für den Wirtschaftsstandort Deutschland zur Folge haben.



October 22, 2008

SWFs and foreign investment policies – an update

Sovereign wealth funds (SWFs) are headed for a new state of normality. Incentivised by internationally agreed principles on transparency and governance, and supported by guidelines for open investment policies in recipient countries, SWFs are set to be recognised by markets and policymakers as institutional investors like many others, albeit of a separate breed.

SWF assets under management have grown to USD 3.6 tr. Growth can be expected to continue at 15% per year, which would bring the industry to almost USD 5 tr of assets by 2010 and USD 10 tr by 2015.

The massive investments in the financial sector over the past year dominate the **major investment trends**. Other trends include the continued leadership of Asian SWFs as investors, the preference of SWFs for investments in North America and the EU, and the relatively balanced sectoral investments in the EU.

Regarding the remarkable **SWF investments in the financial sector** in the past months – amounting to USD 92 bn – events were driven by a confluence of factors, including the availability of funds, the perceived attractiveness of financial-sector investments, low share prices and strategic opportunities. Given the need to keep portfolios diversified, reduce investment risks and limit exposure to incalculable financial risks, this trend has faded for the time being.

Greater transparency and robust governance of SWFs, as well as open investment policies in the recipient countries have rightly been identified as the most important policy objectives in the wake of the public buzz about SWFs.

On transparency and governance, the **International Working Group of SWFs (IWG) has presented 24 principles (GAPP)**, including a commitment to financial objectives and guidelines for better transparency and disclosure of relations to government. The GAPP mark a notable achievement and GAPP compliance stands a good chance of becoming a seal of quality for SWFs.

On investment policies, eyes are now on the OECD to present final guidelines, scheduled for 2009. In the meantime, a number of issues give rise to concern, most importantly the deteriorating climate for investment liberalisation across the world. Policy efforts should focus on bringing the OECD guidelines to fruition, and ensuring that they are adhered to worldwide.

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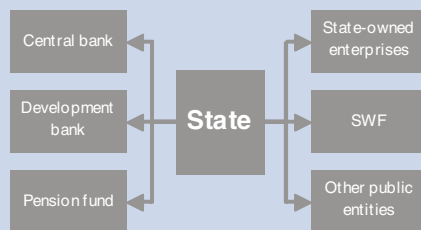
Norbert Walter

Introduction

SWFs – definition and role

SWFs are government-owned investment funds which are commonly funded by the transfer of foreign exchange assets, and which are set up to serve the objectives of a stabilisation fund, a savings fund for future generations, a reserve investment corporation, a development fund, or a contingent pension reserve fund by investing the funds on a long-term basis, often overseas.

In doing so, SWFs fulfil functions complementary to other state-operated entities, such as central banks, development banks and pension funds, and to other state-owned assets, like state-owned enterprises, and other public entities.



Sovereign wealth funds (SWFs) have attracted great attention lately, and have busied financial dealmakers, policymakers, economists and the academic community at the latest since mid-2007 when the scale of the SWFs' business and their potential influence in conjunction with the emergence of new players, mainly in emerging markets, were fully realised by the wider public.

As the public buzz started, we provided a comprehensive analysis of SWFs, their relevance for financial markets and the related political issues.¹ Since then, a lot has changed. An intense debate has evolved over increasing the transparency of SWFs and strengthening their governance. Some states have revised their investment policies. And most importantly, SWFs have pursued a number of landmark investments, not least in the ailing financial services industry.

This report provides a follow-up to the 2008 Fall Meeting of the International Monetary Fund (IMF), on the occasion of which the International Working Group of Sovereign Wealth Funds presented its Generally Accepted Principles and Practices (GAPP) for SWFs. In particular, we submit

- an update on market developments,
- additional analysis of SWFs and their activities, and
- a review of policy initiatives launched in the past months.

We will argue that SWFs are headed for a new state of normality:

- a state of normality in which SWFs are recognised by markets and policymakers as institutional investors like many others, albeit of a separate breed;
- a state in which international principles will provide incentives for SWFs, facilitating their acceptance in foreign markets and political environments;
- a state in which internationally agreed principles provide a yardstick for open investment policies in recipient countries; and
- a state in which the largest SWFs will retain their status as celebrity institutional investors since their sheer size and aura will frustrate any plans for them to keep a low profile in their work.

Global SWF industry – state of development

Asset volumes

The size of the SWF industry has developed forcefully over the past year, driven by continuingly high incomes from commodity sales and reserves accumulation for existing funds as well as the establishment of new entities.

Forceful asset growth

¹ Kern (2007).



Overview of important SWFs worldwide*

Country	Fund	Year	Source		Assets under Management (USD bn)
			C	NC	
AE	Abu Dhabi Investment Authority (ADIA)	1976			875
NO	Norges Bank Investment Management (NBIM)	1990			401
SA	Various funds	NA			350
SG	Government of Singapore Investment Corporation (GIC)	1981			330
KW	Kuwait Investment Authority (KIA)	1953			264
CN	China Investment Corporation (CIC)	2007			200
HK	Hong Kong Monetary Authority Investment Portfolio	1998			152
RU	Reserve Fund	2008			141
SG	Temasek Holdings Ltd.	1974			131
LY	Libyan Arab Foreign Investment Company (LAFICO)	1981			100
AE	Investment Corporation of Dubai	2006			82
QA	Qatar Investment Authority (QIA)	2005			60
AU	Australian Government Future Fund (AGFF)	2004			59
RU	National Wealth Fund	2008			49
DZ	Fonds de Régulation des Recettes de l'Algérie	2000			47
US	Alaska Permanent Reserve Fund Corporation (APRF)	1976			40
BN	Brunei Investment Agency (BIA)	1983			35
IE	National Pensions Reserve Fund (NPRF)	2001			31
SK	Korea Investment Corporation (KIC)	2006			30
KZ	Kazakhstan National Fund (KNF)	2000			26
VE	National Development Fund of Venezuela	2005			21
CL	Economic and Social Stabilization Fund (ESSF)	2007			17
NG	Excess Crude Account	2004			17
CA	Alberta Heritage Savings Trust Fund	1976			17
MY	Khazanah Nasional Berhad (KNB)	1993			16
US	New Mexico State Investment Office Trust Funds	1958			15
IR	Foreign Exchange Reserve Fund	1999			15
TW	Taiwan National Stabilisation Fund (TNSF)	2000			15
AE	Abu Dhabi International Petroleum Investment Company	1984			12
NZ	New Zealand Superannuation Fund	2003			11
BH	Bahrain Mumtalakat Holding Company	2006			10
AE	Mubadala Development Company Abu Dhabi	2002			10
AE	Istithmar World of Dubai	2003			10
OM	State General Stabilisation Fund (SGSF)	1980			8.2
BO	Pula Fund	1993			6.6
SA	Sanabil al-Saudia	2008			6.5
MX	Oil Income Stabilization Fund	2000			5.0
US	Permanent Wyoming Mineral Trust Fund (PWMTF)	1974			4.0
AZ	State Oil Fund of the Republic of Azerbaijan (SOFAZ)	1999			3.3
US	Alabama Trust Fund	1986			3.1
TL	Timor-Leste Petroleum Fund	2005			3.0
NO	Government Petroleum Insurance Fund (GPIF)	1986			2.9
CL	Chile Pension Reserves Fund	2007			2.4
CO	Colombia Oil Stabilization Fund	1995			2.1
VN	Vietnam State Capital Investment Corporation (SCIC)	2005			2.1
TT	Heritage and Stabilisation Fund	2007			2.0
AE	Ras Al Khaimah Investment Authority (RAK IA)	2008			1.2
VE	Investment Fund for Macroeconomic Stabilization (FIEM)	1998			0.8
KI	Revenue Equalisation Reserve Fund (RERF)	1956			0.6
CA	Fonds des Générations, Québec	2006			0.6
GA	Fund for Future Generations	1998			0.4
UG	Poverty Action Fund	1998			0.4
MR	Fonds National des Revenus des Hydrocarbures	2006			0.3
SU	Oil Revenue Stabilization Account	2002			0.3
PG	Mineral Resources Stabilization Fund (MRSF)	1974			0.2
AO	Reserve Fund for Oil	2007			0.2
TV	Tuvalu Trust Fund	NA			0.1
FM	Compact Trust Fund of Micronesia	NA			0.1
MH	Compact Trust Fund of the Marshall Islands	NA			0.1
ST	National Oil Account of São Tomé, Príncipe	2004			0.0
TO	Tonga Trust Fund	NA			0.0
AE	Dubai International Financial Centre Investments (DIFC)	2002			NA
NR	Phosphate Royalties Stabilization Fund of Nauru	2007			NA
AE	Emirates Investment Authority (EIA)	2007			NA
Total					3,645

Memorandum item : Liquidated funds

RU	Stabilisation Fund of the Russian Federation (SFRF)	03-08			157
PG	Mineral Resources Stabilization Fund (MRSF)	74-01			0.2

* List of SWFs worldwide displaying country of origin, official names or functional descriptions of funds, year of inception, sources of financial assets (C= commodity, NC=non-commodity), assets under management in USD bn, including ranges as estimated by other public and private sources. Data reflect latest available figures as reported by individual entities or other authoritative sources. Various reporting dates between 2004 and 2008.

Sources: Various public sources, GAO, DB Research

1

New SWFs under discussion*

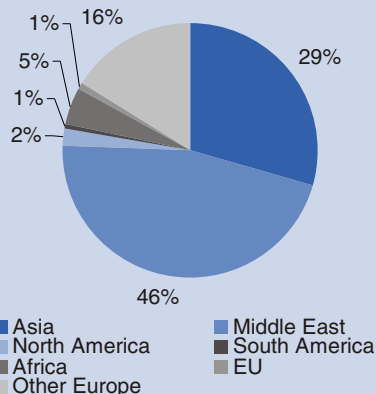
Country	Status	AuM	Year	Source	
				C	NC
Taiwan	Planned	62	2008		
Thailand	Discussed	10	2008		
Japan	Planned	10	2009		
Brazil	Planned	8	2008		
India	Discussed	5	2009		
Bolivia	Planned	NA	2008		
Nigeria	Planned	NA	2008		
Canada	Discussed	NA	2009		
Total		95			

* List of countries in which establishment of SWF is being considered at political level, planned or decided, displaying country of origin, status of the discussion, assets under management in USD bn as planned or announced, expected inception years and sources of financial assets (C= commodity, NC=non-commodity). Data reflect latest available figures as reported by individual entities or other authoritative sources. Nigeria: New fund intended to succeed ECA.

Sources: Various public sources, DB Research **2**

SWF AuM: Regional distribution

Regional distribution of SWF assets
% of total AuM: USD 3.6 tr



Source: DB Research **3**

The overall volume of assets under management by the 64 SWFs analysed here are currently likely² to total USD 3.6 tr. The assets remain concentrated in the top funds, 10 of which manage more than USD 100 bn each. Thus, the top 10 SWFs administer 85% of all sovereign assets, and the top quarter of all funds claims 91% of total assets. The largest fund alone, ADIA of Abu Dhabi, is speculated to have accumulated USD 875 bn of assets, a quarter of the global total.

Almost half of all sovereign assets are held by funds in the Middle East. At USD 1.6 tr of assets, or 46% of the total, the region represents the highest concentration of SWF assets worldwide. The volume and share of the Middle East is, in fact, likely to be even substantially higher, as no robust data are available on the size of SWFs for a number of states in that region. The most important example is Dubai, which is home to a number of SWF-type entities that have undertaken a number of landmark investments in the past. Their total assets, however, are subject to speculation, and as reliable estimates are not available, they are not included in the current calculations. Other Middle Eastern states maintain SWFs for which the available estimates are likely to be outdated, and current values may therefore understate the real size of their SWFs.

With around USD 1 tr in volume, or 29% of the total, Asia is the second largest region with SWF assets, followed by non-EU Europe – mainly Russia and Norway – with USD 0.6 tr or 16% of assets, and Africa with USD 0.2 tr or 5%. The EU – home to only one SWF-type vehicle, the Irish National Pensions Reserve Fund – and South America, with a share of below 1% each, play no significant role in a global comparison.

The rise in assets over the past year amounts to an estimated USD 450 bn, up 14% from the estimated volume of assets in mid-2007. Keeping in mind the vagueness of the underlying data, this is well in line with our 13% projection for average annual asset growth. The development reflects an increase in the size of a majority of the existing funds fuelled by the continued inflow from government revenues or excess reserves, as well as the establishment of new entities.³ These prominently include the China Investment Corporation (CIC) as well as two funds in Russia. In both countries, the funds succeeded entities that had existed before, so net new monies were lower than the initial endowments for the new funds.⁴

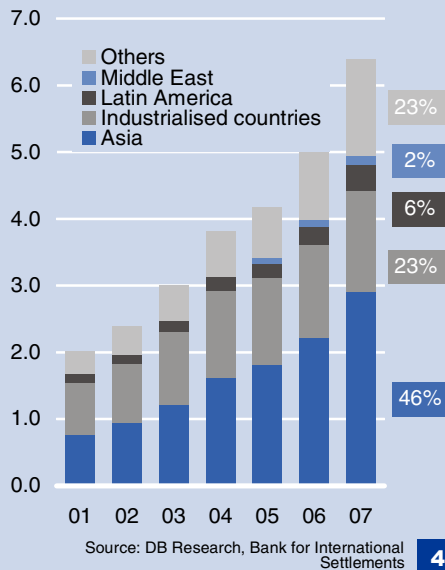
² Despite minor recent advances, authoritative or authorised information on asset sizes, asset allocation, funding, investment strategies and other details of SWFs and their operations is still very scarce. The figures presented in this study have been collected from various publicly available sources and checked against public market information with the aim of maximising plausibility. Given the fragility of underlying data, all SWF-related figures and the calculations based upon them in this article should be considered as indicative and treated with due caution.

³ The list also includes ten smaller entities which had not been listed in earlier accounts, whose addition does not significantly influence the calculation of total assets under management.

⁴ The CIC, equipped with an initial endowment of USD 200 bn, replaced China Central Huijin Investment Corporation, which had been established in 2003 to recapitalise state-owned commercial banks. It became a wholly-owned subsidiary of CIC for a reported USD 67 bn. Another USD 50 bn of the remaining CIC funds are understood to have been earmarked for further restructuring of state-owned financial institutions, so that around USD 80 bn will be available for discretionary, SWF-type investment. In Russia, the former Stabilisation Fund was succeeded by a Reserve Fund and a National Wealth Fund whose combined total exceeds USD 190 bn.

Official reserves

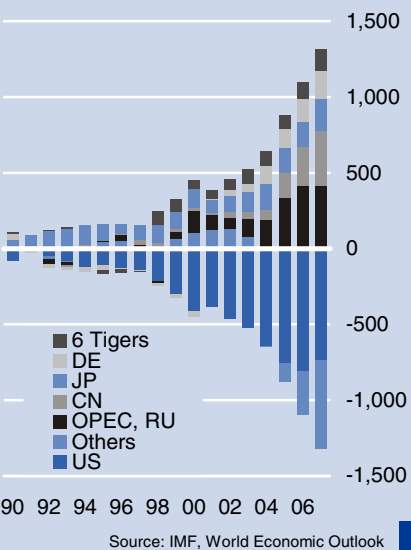
Official reserves held by central banks, USD bn, and % of total USD 6.4 tr at end 2007



4

Current account balances

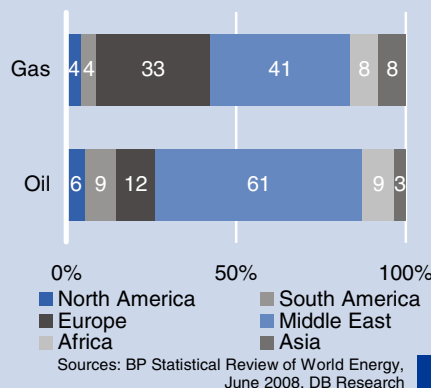
USD bn



5

Oil and gas reserves by region

Proved oil and gas reserves as % of global total, end-2007



6

Fund sources – current accounts, reserves, commodities

In our earlier study, we extensively discussed the motivations behind establishing SWFs and their sources of funding – an important aspect not only for explaining the growth of sovereign assets as it occurs but particularly for assessing their future growth potential. Broadly speaking, SWF funding differs depending on whether their capital is taken from balance-of-payments surpluses and the central bank reserves that may be accumulated from them or else from fiscal surpluses, e.g. from the export of natural resources, especially oil and gas, and the related taxes.

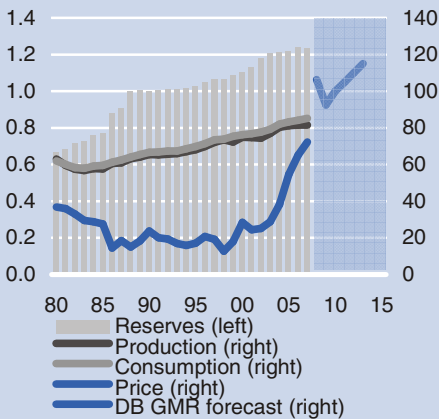
Many emerging markets have been extremely successful in generating such excess funds, be it in the Middle East or parts of Latin America and Africa on the sale of oil, gas or other commodities, or in Asia on competitive advantages in the production of e.g. consumer and manufacturing goods.

This growth trend for funding sources has continued in the past months:

- **Central bank reserves:** By end-2007, global central bank reserves had risen 27% on the previous year, driven by reserves in Asia (31%), the Middle East (35%), and Latin America (47%). Reserves in the industrialised world, by comparison, grew by a mere 8% in that period. Official reserves thereby continue a trend that has been observable for a long time and which has accelerated recently, exhibiting annual average growth rates of 11% over the past 20 years, 15% over the past ten years and even 22% in the last five years. The respective values for individual emerging markets can be significantly higher than that. Technically, and assuming stable conditions for international money and exchange rate markets and regimes, there are no material indicators that strong growth of official reserves will not continue to prevail in the short and medium term.
- **Current account surpluses:** The rise in reserve assets reflects not least the success in many emerging markets in improving external trading positions and running substantial current account surpluses. These have widened further in recent months, amounting to more than USD 1 tr by mid-2008 for China, Russia, the six emerging Asian economies and the OPEC countries combined. As the major emerging markets can be expected to maintain their competitiveness in important goods and services markets and may be able to position themselves favourably in others in which they have not established themselves yet, current account surpluses in these economies can be expected to rise further going forward.
- **Oil and gas reserves:** A similar pattern can be observed for oil and gas reserves – a major funding source for the most potent funds in the Middle East, but also in Africa and South America, in which a vast share of the reserves are located. While the growth of proved reserves has been decelerating in recent years, production and consumption have been rising steadily, laying the foundation for a sustained increase in prices. Although influenced in the short term by a number of additional factors, prices for oil and gas on international markets have seen a dramatic rise, especially during the past year. Even though the most immediate upward pressures seem to be levelling off, prices are expected to remain high. Taken together, these factors warrant the

Oil reserves and price trends

Proved oil reserves in tr bbl, oil production and consumption in m bbl per day, price per bbl crude oil and DB Global Markets Research forecast per bbl WTI in USD

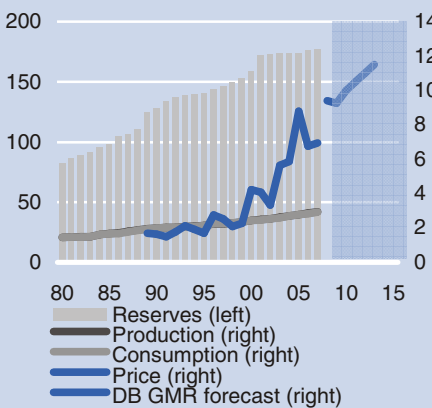


Sources: BP Statistical Review of World Energy, June 2008, DB Research

7

Gas reserves and price trends

Proved gas reserves in tr cubic meters, gas production and consumption in tr cm per year, price and DB Global Markets Research forecast in USD per m btu (US)

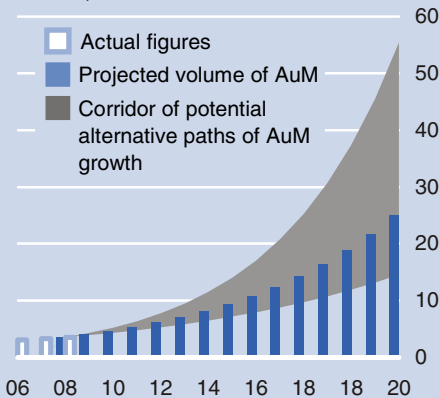


Sources: BP Statistical Review of World Energy, June 2008, DB Research

8

SWF growth scenarios

Expected growth of SWF AuM, based on past 10Y growth of official reserves assets, USD tr



Projected volumes of SWF AuM based on 15.01% 10Y CAGR of official central bank reserves. Corridor of potential alternative paths of AuM growth based on 21.72% 5Y CAGR of official central bank reserves for high-growth scenario and 10.64% 20Y CAGR for low-growth scenario. Actual figures as observed.

Source: DB Research

9

expectation that oil and gas-fuelled SWFs have a solid basis for additional asset growth in the short to medium term.

Projections for SWF growth

On the basis of these estimations for the underlying sources of SWF funding, we maintain our moderately positive outlook for the growth of state-owned funds.

As argued earlier, it is reasonable to take a balanced approach to assessing the future of such entities. True, official reserves, current account and government surpluses, and receipts from the sale of commodities are a formidable source from which governments can theoretically feed their state-owned funds.

But they don't have to do this, and – as state entities – their growth and behaviour cannot be as easily inferred from quantitative evidence as we are used to in the context of market-based developments. On top of this come a number of substantial sources of uncertainty about their potential funding, including overall economic performance, monetary and exchange rate conditions as well as broader political and strategic issues in what in some cases are fragile regions. In addition, and as already observed, the data available on current asset volumes are not robust, which necessarily weighs on the reliability of future projections. As a result, any forecasts on asset growth about SWFs should be considered with caution.

Starting from the satisfactory fit of our earlier projections, and adjusting for the additional data collected since, we expect SWF asset growth to continue to grow at around an average annual rate of 15% in the coming years which – if maintained – would under reasonable assumptions most likely bring global SWF assets to USD 4.7 tr by 2010 and almost USD 10 tr by 2015.⁵ Other scenarios are conceivable but significantly less likely.⁶

Investment patterns

Evidence on the actual investments undertaken by SWFs and the patterns that emerge has to be approached with even greater caution than the volume of assets as such. Nevertheless, a look at the largest reported equity transactions of the past years reveals a number of instructive stylised facts about SWFs and their investment focus.⁷

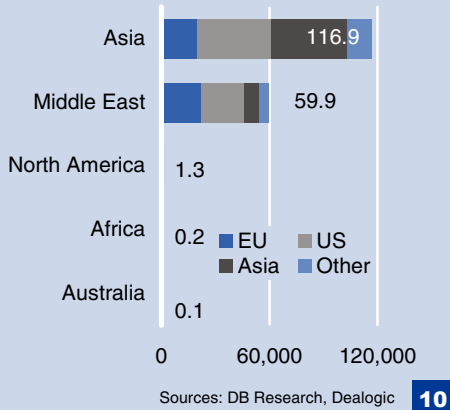
⁵ Closely corresponding to the USD 5 tr we had projected for 2011 and over USD 10 tr for 2016 we had calculated in our earlier study based on the data available then.

⁶ Alternative growth scenarios as indicated by the shaded area in chart 9. If reserve accumulation returned to more moderate growth rates as witnessed on average over the past 20 years, these figures could turn out lower. SWF assets would then end up at around USD 4.2 tr in 2010 and just over USD 7 tr in 2015. If, on the other hand, reserve accumulation continued at the pace observed in recent years, SWF asset accumulation would accelerate further, bringing the total to over USD 5 tr by 2010 and USD 14 tr by 2014.

⁷ The data and analyses presented below are based on transactions as reported by Dealogic in which at least one SWF participated as an acquirer of a minority, majority or 100% stake in a company between 1995 and July 31, 2008. The data do not reflect all transactions undertaken by all SWFs. For example, none of the transactions undertaken by the Norwegian pension reserves fund are registered in the database. The same goes for a number of other entities. Similarly, the investment volumes in this study do not exclusively reflect SWF commitments but the total volume of transactions, including participations by other investors, including from the private sector. In this respect, the data presented here should be understood as tentative indicators of broad trends.

Origins of SWF

Investments with SWF participation by origin of SWF and location of target, reported and completed transactions, 1995-Jul 2008, USD bn



1. Asian SWFs are the leading investors

In terms of investment transactions, SWFs located in Asian economies are the most active investors, contributing 66% of the funds of the transactions which have been reported globally since 1995 and which amounted to USD 178 bn in total. Middle Eastern state-owned funds contributed 34%. Other regions do not play a significant role as origins of state funds.

2. North American and EU firms as prime targets

North American and European companies have been the targets of choice for state investors. 37% of the total transaction volume was related to North American enterprises and 32% to Europe-based firms. To some extent, this large share reflects that traditional European and American capital markets offer the widest selection of investments and a high level of liquidity, and are thus able to absorb the large volumes institutional investors typically seek to allocate. Other considerations, including expected returns at the time the investment were made or diversification may have contributed to this outcome.

Asia is not only home to the most active state investors, but is also among the most preferred regions of investment, absorbing 28% of the volumes reported.

Investments in Asia are predominantly intra-regional, i.e. they originate to a large part – 83% by volume – from Asian SWFs. Intra-regional transactions in the Middle East are, in contrast, much less frequently reported.

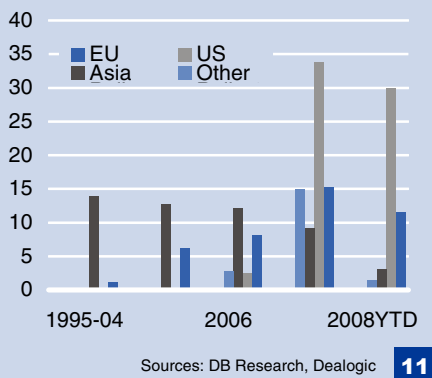
3. 2007-2008 – big time for SWFs

The vast majority of investments reported between 1995 and today were made in the past two years, or, more precisely, since mid-2007.⁸ Two-thirds of all transactions reported have been undertaken since then. This concentration primarily reflects the large investments in financial institutions in the US and Europe as observed in the wake of the financial crisis, which will be analysed in greater detail below.

Interestingly, the volume of investments in Asia, including intra-Asian transactions, has declined since reaching a peak in 2005, a trend which may reverse once the SWFs shift their focus away from financials in traditional industrialised economies.

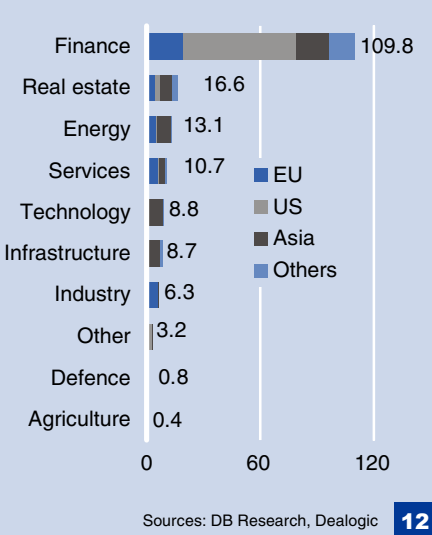
SWF investments over time

Investments with SWF participation by time period, reported and completed transactions, USD bn



SWF investments by sector

SWF investments by sector of investment target and region, reported and completed transactions, 1995-Jul 2008, USD bn



4. Finance as the sector of choice

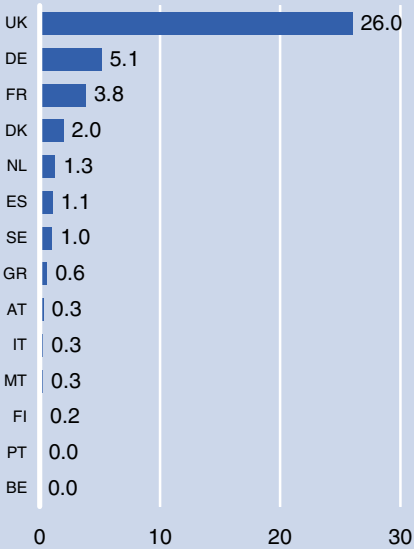
In aggregate, financial institutions have been the main beneficiaries of SWF investments.⁹ This goes back to the transactions related to

⁸ It is highly likely that the data not only reflect an increase in the number and volume of transactions, but also the increased alertness of market observers regarding SWF activities since the attention of the wider public started to focus on these entities, which in turn facilitated the registration of SWF transactions. A similar caveat applies to the sectoral breakdown, which may not only reflect the substantive size of SWF investments in the financial industry, but also the fact that many investments in non-financial firms may have gone unnoticed while markets were closely observing the financial sector.

⁹ The sectors referred to throughout the text and charts are defined as follows. Agriculture: agribusiness, forestry, paper. Commodities: utilities, energy, oil, gas, mining. Defence: defence goods. Finance: financial services, insurance. Industry: metal, steel, textiles, machinery, chemicals, cars, trucks. Infrastructure: infrastructure, transportation. Real estate: real estate, property, construction, building. Services: professional services, publishing, healthcare, retail, food, beverages, dining, lodging, leisure, recreation, consumer products. Technology: computer, electronics, telecommunications, aerospace. Other: holding companies, government entities.

EU: SWF investments in the member states

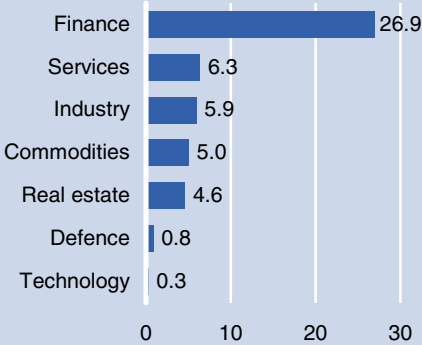
Investments with SWF participation in EU by origin of recipient companies, reported and completed transactions, 1995-Jul 2008, USD bn



Sources: DB Research, Dealogic **13**

EU: SWF investments by sector

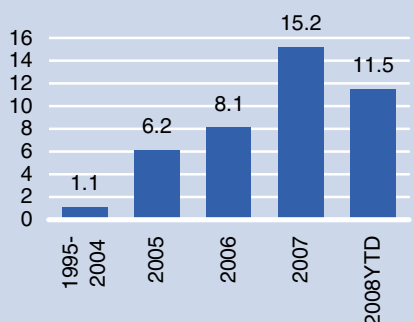
Investments with SWF participation in EU by sectors of recipient companies, reported and completed transactions, 1995-Jul 2008, USD bn



Sources: DB Research, Dealogic **14**

EU: SWF investments over time

Timing of investments with SWF participation in EU, reported and completed transactions, in USD bn of USD 42 bn total volume



Sources: DB Research, Dealogic **15**

Wall Street and some European banks with investment volumes unseen to that point.

Given that these investments can be regarded as part of a recent, singular phase of investment activity, other sectors deserve attention in view of long-term investment trends. Real estate and construction with USD 17 bn worth of investments, commodities and energy with USD 13 bn, services and retail with USD 11 bn, technology with USD 9 bn, infrastructure and transportation with USD 9 bn, and industry with USD 6 bn are further important targets of SWF investment activity.

Regarding commodities and energy, technology, and infrastructure and transport, Asian enterprises have been the most preferred targets of state investments, mainly reflecting intra-regional diversification. In real estate and construction as well as services, the distribution has been more balanced across the regions. Regarding industrial companies, the EU with its strong and competitive industrial base has been the most interesting investment location.

5. Defence investments are not an issue

Foreign state investments in defence-related companies – one of the most critical issues in political debates in the US and the EU – have played an insignificant role. The records show only one transaction – Dubai International Capital’s 3.12% share in EU-based EADS which was acquired in 2007.

6. EU: UK as the prime investment target – with or without financials

In the EU, the UK is the economy that has attracted the highest volumes of the investments reported, totalling USD 26 bn since 1995. Recent investments in finance are an important explanation for this high figure, accounting for USD 16 bn or two-thirds of the inflows.

And even leaving this important sector aside, the UK still attracts more funds than Germany as the runner-up with USD 5.1 bn of SWF-related investments. This figure can be traced back to three major investments, namely by the Dubai cluster in car manufacturer Daimler in 2005 and in specialty alumina producer Almatris as well as in Deutsche Bank in 2007. Other transactions, including in real estate and the chemicals industry, were lower profile.

7. EU: Investments from Asia and ME in balance

SWF investments in the EU come in almost equal shares from the Middle East (52% of the volume) and Asia (48%), suggesting a more general interest in EU investments which also exhibit a comparatively solid degree of continuity over time.

8. EU: Diversified investments

Investments in the EU have been diversified in terms of targeted sectors, benefiting the services and retail sectors, industry, commodities and energy, and real estate and construction alike. As already discussed, the extraordinary, large investments in the financial sector are an outlier in the general picture.

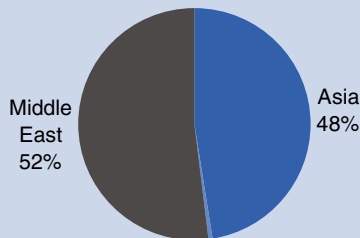
9. US: Non-financial sector targets of lesser interest

At USD 60 bn, investments in the financial sector have been the dominant theme in the US market. Real estate and other sectors follow, but at an extremely wide interval.



EU: SWF investors by region

Origin of investments with SWF participation in EU, reported and completed transactions by origin of SWF, 1995-2008YTD, % of USD 42 bn total volume

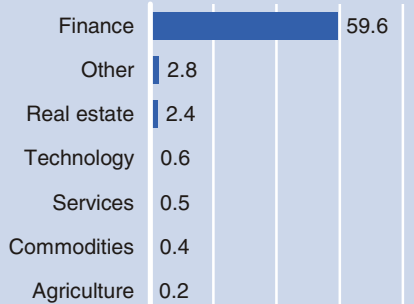


Sources: DB Research, Dealogic

16

US: SWF investments by sector

Origin of investments with SWF participation in US, reported and completed transactions by sector of recipient companies, 1995-Jul 2008, USD bn

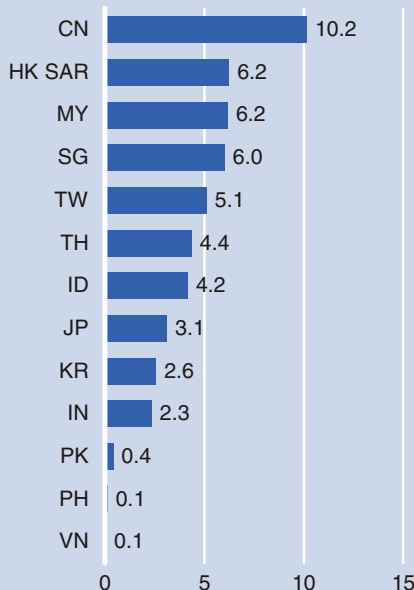


Sources: DB Research, Dealogic

17

Asia: SWF investments in individual countries

Investments with SWF participation in EU by origin of recipient companies, reported and completed transactions, 1995-Jul 2008, USD bn



Sources: DB Research, Dealogic

18

10. Asia: Balanced regional investments with China as the prime location

SWF investments in Asia – mostly intra-regional as already observed – are spread comparatively widely over the region. China emerges as the most sought-after investment location, absorbing USD 10 bn of funds in the course of time. But with investment volumes topping USD 4 bn, economies like Hong Kong, Malaysia, Singapore, Taiwan, Thailand and Indonesia have also received comparatively large chunks of the funds provided by SWFs.

11. Asia: Balanced sectoral investments

A similarly balanced picture emerges with respect to the sectoral distribution of SWF commitments in Asia. Even though financial investments have recently dominated the agenda, too, state investors have participated in a large number of transactions across a variety of sectors since 1995, with investments in excess of USD 6 bn in finance, commodities, infrastructure and real estate. The services industry received slightly lower but still substantive volumes totalling almost USD 3 bn.

12. Recent investment trends – financials and US

Looking only at recent investments – starting from 2007 till today – it is not surprising to find subprime-related opportunistic investments in the ailing financial industry, especially in Wall Street banks, the dominant investment theme.

Consequently, investment flows exhibit a very strong sectoral bias towards financial institutions, and, in regional terms, the US. Thus, other sectors, including industry, services, commodities and energy, are dwarfed by the total of USD 92 bn of investments in the global financial industry in the past 18 months. Correspondingly, the share of funds flowing into the US rose from one-third in the longer period since 1995 to over 50% of the global total in 2007 and 2008.

SWFs and the global banking industry – true love or pricy fling?

As already observed, the financial sector has been a preferred investment market for SWFs in the course of the months starting November 2007 through July 2008. Three key questions arise. First, why has this bonanza occurred? Second, will it be a trend that continues, or has the appetite for participations in financial firms been satiated? And finally, what are the strategic economic and political implications of these investments?¹⁰

Confluence of factors

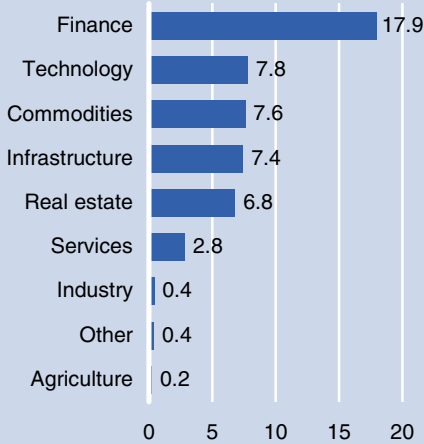
As to the factors contributing to the investment rush, five coinciding factors can be identified:

- **Availability of funds:** Obviously, SWFs, especially the larger ones, have been in a position of ample funding for a while, providing them with substantial buying power.
- **Attractiveness of financial sector:** Irrespective of market conditions as they occurred, the financial sector had until lately been considered an attractive investment target, featuring

¹⁰ The capital holdings and figures displayed here reflect the state of affairs at August 15, 2008.

Asia: SWF investments by sector

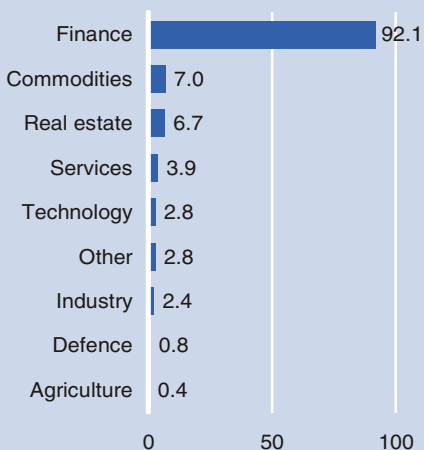
Investments with SWF participation in Asia by sector of recipient companies, reported and completed transactions, 1995-Jul 2008, USD bn



Sources: DB Research, Dealogic **19**

Recent SWF investments - sectoral trends

Investments with SWF participation worldwide by sector of recipient companies, reported and completed transactions, 2007-Jul 2008, USD bn



Sources: DB Research, Dealogic **20**

double-digit returns on equity for banks – 16.9% in the EU-25 and 12.3% in the US in 2006 – and cumulative pre-tax profits in excess of USD 3 tr over the past five years among the top 1,000 banks worldwide. Even against the background of the first waves of the financial crisis, large banks continued to be regarded as having substantial growth and profitability potential in the medium and long run.

- **Low share prices:** The financial turmoil has provided an attractive – albeit volatile – environment for investors interested in longer-term commitments as shares prices of most banks and other financial institutions have fallen dramatically since mid-2007. Today, the market value of most major banks has fallen to between 60% and 20% of their values just 18 months back.
- **Strategic opportunities:** Next to immediate financial objectives, participation in large and well-established financial institutions can be regarded as offering strategic benefits over time, laying the foundations for closer business ties with – as viewed from the perspective of individual SWFs and the parent states – their domestic banking and industrial sectors.
- **Reputational benefits:** At least with hindsight, the engagement in the US and European financial sectors has brought individual SWFs, and the asset class as a whole, a perceivable gain in reputation. From an SWF perspective, this can be considered valuable progress. After all, just before the sub-prime crisis erupted, SWFs had found themselves at the core of a controversial debate especially in the US and many European countries about whether SWFs and other state-owned investors from the emerging markets were posing a threat or an opportunity. Following their investments in the financial industry – at a time when some banks were facing serious problems with regard to their capitalisation, and conventional, market-based sources of capital had dried out – SWFs have experienced a more benign reception in the US and Europe, with policymakers and the wider public recognising the helpful role they played in a critical phase of market developments.

Taken all together, the wave of SWF investments in financial institutions in 2007 and 2008 is owed to the confluence of a number of key factors that encouraged large SWFs to undertake a number of major – in some cases ambitious – investments, and to the fact that business and political leaders in the recipient countries welcomed this engagement rather than calling it into question right away.

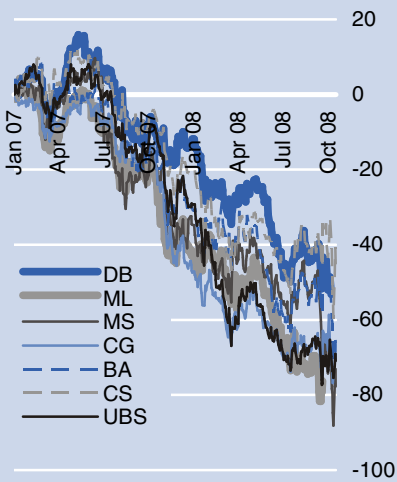
A trend fading out?

A number of factors suggest that the rush by SWFs into American and European financials has seen its peak and is fading – at least for the time being.

- **Portfolio diversification:** In the past 18 months, SWFs have participated in USD 92 bn worth of investments in the financial sector, by far the largest share of total SWF investment. In addition, many transactions represented large single investments, increasing concentration risks in SWF portfolios. Finally, it is worth noting that these enormous investments were undertaken by a small number of funds. Especially for these funds the appetite for finance-related assets may therefore be reaching a point of satiation. With a view to portfolio diversification, they may

Bank share performance

Share prices of major banks, performance since Jan 1, 2007 (%)

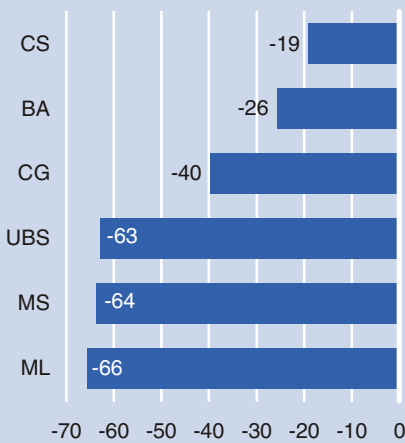


Note: DB=Deutsche Bank, ML=Merrill Lynch, MS=Morgan Stanley, CG=Citigroup, BA=Barclays, CS=Credit Suisse, UBS

Source: DB Research **21**

Performance of SWF investments in major banks

Development of share prices between respective date of investment by SWF and Oct 16, 08, change in %, only investments made since start of sub-prime crises



Note: ML=Merrill Lynch, MS=Morgan Stanley, CG=Citigroup, BA=Barclays, CS=Credit Suisse, UBS

Source: DB Research **22**

now be looking to other sectors for future investment opportunities.

- **Investment risks:** Like many other investors, SWFs have incurred substantial losses on their bank portfolios over the past months and weeks. Although most SWFs invested in US and European banks at very attractive valuations from a historical perspective, share prices have fallen further. By mid-October 2008, the decline in bank share prices since the date of the respective SWF investment had ranged from 19% up to 66%. Emergency measures, such as recapitalisation and mergers, are set to have substantial implications for sovereign stakeholders that most likely were not part of the original investment rationale.
- **Continued unpredictability of financial markets:** At the same time, conditions in international financial markets are likely to remain volatile. The distribution of credit risks in the industry continues to be unclear with substantial uncertainties and mistrust among market participants. The fall of 2008 has brought another wave of failures of major financial institutions. Despite massive governmental and central bank intervention in the US and Europe, banking markets are set to remain in distress for a while. In addition, the recent peak of the financial crisis and the demise of major investment banks have raised fundamental questions about the viability of business models in the banking sector, suggesting the possibility of major realignments in strategies and structures. Further, there can be little doubt that regulators and supervisors will reconsider their approaches and tighten financial market rules and their enforcement.

While the banking industry as a whole may be cutting a rather pitiful figure these days, this does not necessarily mean that banks are all out as investment targets. The recent investment in Credit Suisse by the Qatar Investment Authority shows that SWFs remain active players.

Whether SWFs will resume their engagements in the financial sector crucially depends on how the crisis evolves in the coming weeks and months, how deep it is going to be, and how soon and swiftly the banking sector recovers afterwards. The latter also includes the prospects for profitability given the likely change in the shape and structure of the banking business in the near future. Finally, it cannot be excluded that – in case of a serious deterioration of financial conditions and increasing government involvement in their resolution – sovereign funds, including the emerging markets, may turn out to play an even more prominent role than already observed.

SWFs and the global banking industry – policy implications revisited

Not only the total volumes of recent SWF investments in banks are impressive, but also the size of their interests and the prominence of institutions in which they are co-owners now, as the table on page 12 illustrates. Other things being equal, SWFs are likely to occupy an influential position in these companies – alongside domestic data investors, as a result of emergency equity purchases by US and EU governments.

Is this a problem? The short answer is “no” as long as state investors exclusively act as financial investors and if SWFs manage to meet the concerns of market participants and policymakers

Major SWF interests in financial firms**China (CIC)**

Blackstone Group	US	9.9
China Development Bank	CN	NA
HSBC Group	UK	0.0
Morgan Stanley	US	9.9
VISA Inc.	US	NA

Singapore (GIC, Temasek)

Bank of China	CN	10.0
Barclays Bank	GB	3.1
China Construction Bank	CN	5.1
Citigroup	US	4.5
ICICI Bank Ltd.	IN	9.6
Merrill Lynch	US	9.9
Standard Chartered Bank Ltd.	GB	18.0
UBS	CH	9.0

South Korea (KIC)

Merrill Lynch	US	7.4
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UAE, Dubai (DFG, DIFC, DIFX et al.)

Bombay Stock Exchange	IN	4.0
Deutsche Bank	DE	2.2
Euronext	NL	3.5
Hellenic Exchange	GR	3.0
HSBC Holdings Plc.	GB	0.5
ICICI Bank Ltd.	IN	2.9
London Stock Exchange	GB	28.0
Nasdaq	US	20.0
Och-Ziff Capital Management Group	US	9.9
OMX	SE	28.4
Perella Weinberg Partners LC	US	10.0
Standard Chartered Bank Ltd.	GB	2.7

UAE, Abu Dhabi (ADIA et al.)

AP Alternative Asset LP	US	40.0
Apollo Management	US	40.0
Carlyle Group	US	7.5
Citigroup	US	4.9

Kuwait (KIA)

Citigroup	US	0.7
Merrill Lynch	US	5.7

Qatar (QIA)

Barclays Bank	GB	8.9
Credit Suisse	CH	2.0
London Stock Exchange	GB	24.0
OMX	SE	10.0

Note: Stakes by sovereign investors in financial firms worldwide at mid-Oct 08, country of domicile of investment target, % share in target. Largest investments only, incomplete list.

Source: DB Research **23**

regarding the perceived lack of transparency and worries over their governance.

Investments in strategic assets

Critics have argued that investments by foreign states could be driven by motivations other than purely financial ones, e.g. strategic political interest. This, in turn, could *in extremis* lead to situations in which national political or economic interests and not least the economic interests of the invested company could be violated.

Banks and the wider financial sector, to be sure, represent a vital part of national and international economies. It would, therefore, not have been surprising had critics of foreign state investments voiced their concerns over the past months when SWFs took stakes in a number of the largest and most eminent financial institutions on Wall Street and elsewhere. What attenuated the reactions, however, were essentially three factors:

- First, SWF investments occurred at a time of serious difficulties for most of the companies concerned; they contributed important capital when the investment targets were facing considerable distress and alternative sources of funding and capitalisation were sparse. This suggests that SWFs have behaved as constructive and responsible market participants and made an important contribution to mitigating the immediate effects of the financial turmoil.
- Second, SWFs have confined themselves to taking minority stakes. Controlling stakes have been avoided, and, in selected cases, the investments were in non-voting shares. In fact, individual stakes have generally remained below the 10% threshold, not least to avoid additional regulatory and supervisory burdens that kick in from that level onwards in many countries. One example is the US, where company stakes of more than 10% set off the CFIOUS investment review and shares in banks from 10% upwards need separate approval by the SEC, and investors become subject to supervision upon obtaining the status of a Bank Holding Company.¹¹ Even if SWFs in some cases became the largest single shareholders in individual banks – which usually puts an investor in an elevated position – the state funds have so far refrained from claiming board seats and playing a role in either the strategic approach or the day-to-day operations of their investments.
- Third, large banks have turned out to have not only one but from two to four different SWFs among their shareholders, thereby relativising the stakes of large shareholders.

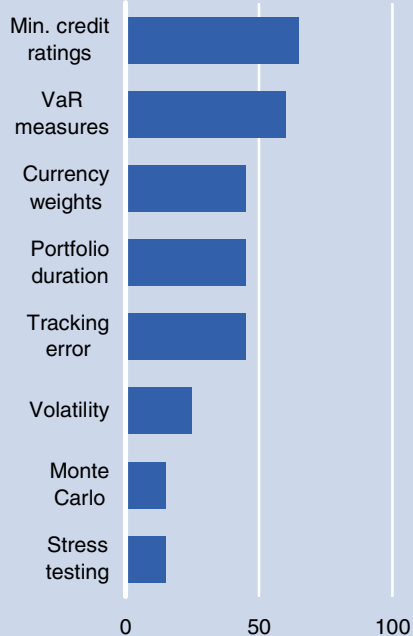
Despite these encouraging signals and the positive reception SWFs have met in the past months in general, it cannot be excluded that once the dust has settled the role of foreign state investors may again be discussed more intensively. This is particularly likely considering the relatively high degree of concentration of SWF investments in financial companies, i.e. the fact that the interests in major international banks and stock exchanges are held by only a handful of state investment funds from Asia – the Chinese, Singaporean and Korean funds – and the Middle East – the SWFs

¹¹ Temasek is understood to have overstepped the 10% threshold with its most recent investment in Merrill Lynch, seeking the approval of the SEC. Following the announced takeover of Merrill Lynch by Bank of America, which will be done by means of a stock swap, the final share in Bank of America, if maintained by Temasek, is likely to be below 10%.



SWF investment behaviour: Risk measures applied

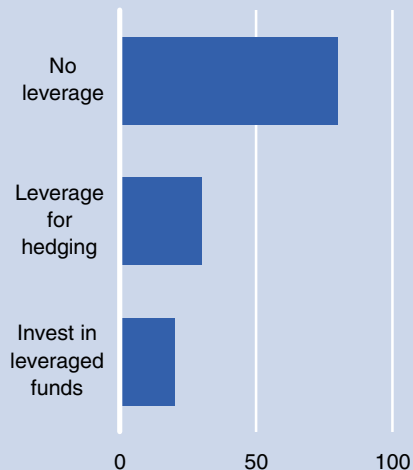
Measures of financial risk as applied by SWFs in their investment decision, % of respondents



Source: IWG 24

SWF investment behaviour: Use of leverage

Use of leverage, % of respondents



Source: IWG 25

in the Emirates, Kuwait and Qatar – as table 23 suggests. In contrast to other groups of institutional investors where a large number of diversified players compete as investors, individual or colluding SWFs would have the potential to exert a correspondingly greater influence on the invested firms and this may be perceived as a particularly sensitive exposure.

In the end it will take a while to invalidate these concerns, and this presupposes that an atmosphere of mutual trust can be achieved through commendable behaviour by both the investors and the invested companies. For the time being, the problem has receded into the background in the US and Europe as domestic governments there are taking substantial equity stakes in many major banks.

Financial stability

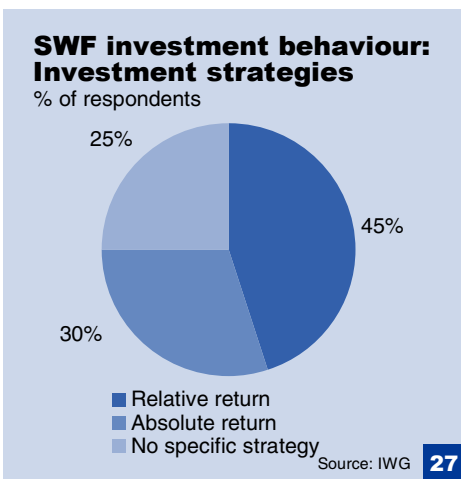
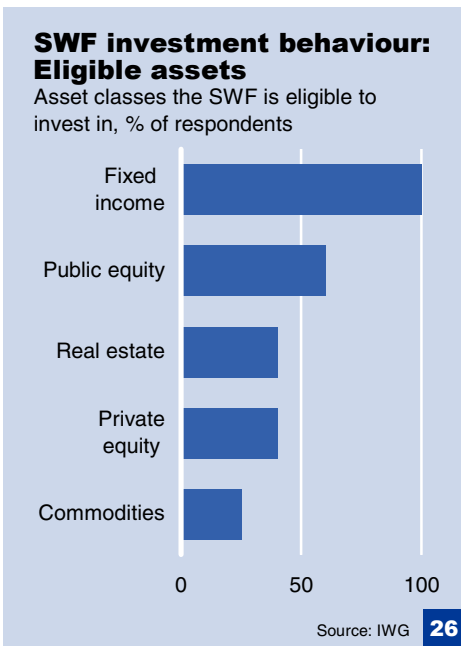
Finally, financial stability has been identified as a central policy issue. On the one hand, SWFs are financial investors whose liquidity and solvency have to be managed prudently in order to meet their objectives of long-term profitability. As the findings of the recent survey by the International Working Group of Sovereign Wealth Funds¹² suggests, this issue is on the agendas of the most important funds. Thus, SWF investment strategies are in most cases governed by rules regarding the eligibility of assets in which a fund can invest, the application of in some cases highly sophisticated risk tools for the management of portfolios, as well as limitations on the use of leverage by the fund (see charts 24 to 27). In addition, it should be noted that – unless an SWF is designed as a pension fund with defined or contingent liabilities – SWFs have no immediate, well-defined payables, making the consequences of a decline in the valuation of their assets in case of a market downturn less severe than in the case of most other institutional investors.

On the other hand, and what is more relevant here, financial stability issues may arise around the way SWFs invest or disinvest in their function as large institutional investors. This has a particular bearing on state investments in banks. The arguments can be summarised as follows:

- In principle, SWF investments in financial institutions can have a stabilising impact on a firm's share price, provided that SWFs have a long-term investment horizon and are less likely than other large investors, such as hedge funds with opportunistic strategies, to pursue discretionary short-term investments and divestments.
- SWF investments and divestments – just like those of any other investor – bear the potential to influence share prices, depending on the size and structure of a transaction and the way it is communicated in the market. Price volatility of a transaction itself may be further aggravated if a purchase or sale is imitated by other market participants and leads to herding behaviour. Herding may, *ceteris paribus*, have more serious implications in case of disinvestments, triggering a subsequent drastic fall in a share price. The greater the information asymmetries in the market, the stronger the fall is likely to be.

If the rationale of these two channels applies in practice, the recent investments by SWFs in major banks should have exerted upward pressure on the share prices of these institutions. The investments came as substantial capital contributions with a presumably long-

¹² International Working Group of Sovereign Wealth Funds (2008).



term horizon at a time of fragile stock market conditions and considerable uncertainty around banks' profitability and risk profiles. The SWF investments therefore could be interpreted as stabilising events, directly strengthening the capital base of the relevant banks and providing important positive signals to other investors. A closer look at the empirical evidence, however, suggests that the impact of SWF investments on the share prices of banks is far from conclusive.

In order to assess this impact, it is useful to analyse the relevant share prices as well as their volatilities and trading volumes. The result of this analysis for a number of the most important recent market events is displayed in the chart on page 16. For each of nine selected SWF investments, the chart provides empirical evidence for the 30 days preceding and following the event. The nine cases include the eight most prominent cases of SWF investments in international banks during the financial crises. The case of DIFC's investment in Deutsche Bank is included for comparison, as this transaction was undertaken before the sub-prime crisis had commenced.

The upper charts display the standard deviation of the five-day moving averages of the share price and its polynomial trend. The middle chart provides evidence on the abnormal returns¹³ generated in the reference period. Abnormal returns reflect the returns of a stock relative to the comparable market segment, and help in assessing whether a certain event specific to a single stock has an impact on its price, which becomes visible by comparing the returns of that stock with those of other stocks which were not subject to the event. In the stylised case of efficient markets, abnormal returns are zero. The greater the deviations from the null hypothesis, the greater the impact of firm-specific events. The lower charts show the trading volumes in millions of shares.

The picture that emerges is naturally blurred by the unsettled market conditions in the financial industry throughout most of 2007 and 2008, creating substantial white noise which reduces the force of the results. This is indicated not least by the case of Deutsche Bank where the investment event occurred prior to the start of the sub-prime crisis. While, in this case, trading activity was normal and volatilities and abnormal returns very low, all other investments have to be seen against the background of strong trading activities in the respective stocks and a significantly elevated level of volatility in share prices and their comparative performance. However, the analysis suggests three conclusions:

- Most importantly, as visible in the development of share prices of the major banks, prices followed a strong downward trend between mid-2007 and mid-2008, which in none of the cases was broken by the SWF investment when it occurred. One interpretation would be that, without SWF investments, individual stocks may have declined even further or faster, but a comparison of stock performances and especially with the benchmark suggest otherwise.

¹³ Abnormal returns are calculated against the MSCI World Banks Index as benchmark. For methodological details see MacKinlay (1997). Abnormal returns are calculated as cumulative abnormal returns as defined below.

$$CAR_i(\tau_1, \tau_2) = \sum_{\tau=\tau_1}^{\tau_2} AR_{i\tau} \text{ where } AR_{i\tau} = R_{i\tau} - \alpha_i - \beta_i R_{m\tau}$$

No lasting impact on share prices

- SWF investments have had no strong or lasting impact on bank share prices. While all indicators show aberrations in selected cases, none of them has been extraordinarily strong or sustained.
- Even in cases where an event's impact can be identified, the direction of the impact is not homogeneous. Thus, volatilities – especially their trends – tended to fall in the cases of the first investments in Citigroup and Merrill Lynch, and slightly less so in those in UBS and Morgan Stanley. In the wake of the investments in Credit Suisse and Barclays, by contrast, volatilities tended to rise. A similarly heterogeneous picture emerges for abnormal returns. While the data almost consistently confirm that the investment events actually did have an impact on share price returns, the question as to whether this impact was positive or negative in terms of cumulative abnormal returns in particular remains open. On the one hand, the follow-up investments in Citigroup and the investments in Merrill Lynch and Barclays seem to have pushed cumulative returns upwards. On the other hand, cumulative returns on the stocks of Deutsche Bank, UBS and Credit Suisse either remained flat or in fact started to decline.

Powerful market sentiments

In summary, it therefore seems that in these selected cases SWFs had neither particularly positive nor negative effects on the stability of share prices. Of course, it is likely that in some cases the investments were of critical importance for stabilising the capital conditions at the invested institution. And although the events did have a discernible impact on the share price, it would be exaggerated to think of SWF commitments fundamentally altering market sentiments in a fragile market environment.¹⁴

SWF behaviour during disinvestments

One important issue that will be crucial to watch in the future is the impact of disinvestments by SWFs, especially in the case of the financial industry, and in particular when we think of the large shares – from a market perspective rather than a corporate governance view – that some SWFs now hold in financial institutions. In practice, the effect of disinvestments on market stability hinges, among other things, on the form in which the sale is transacted, in particular whether an investor sells on the open market or via block trades, and whether the share is sold down gradually.

SWFs work with great consideration

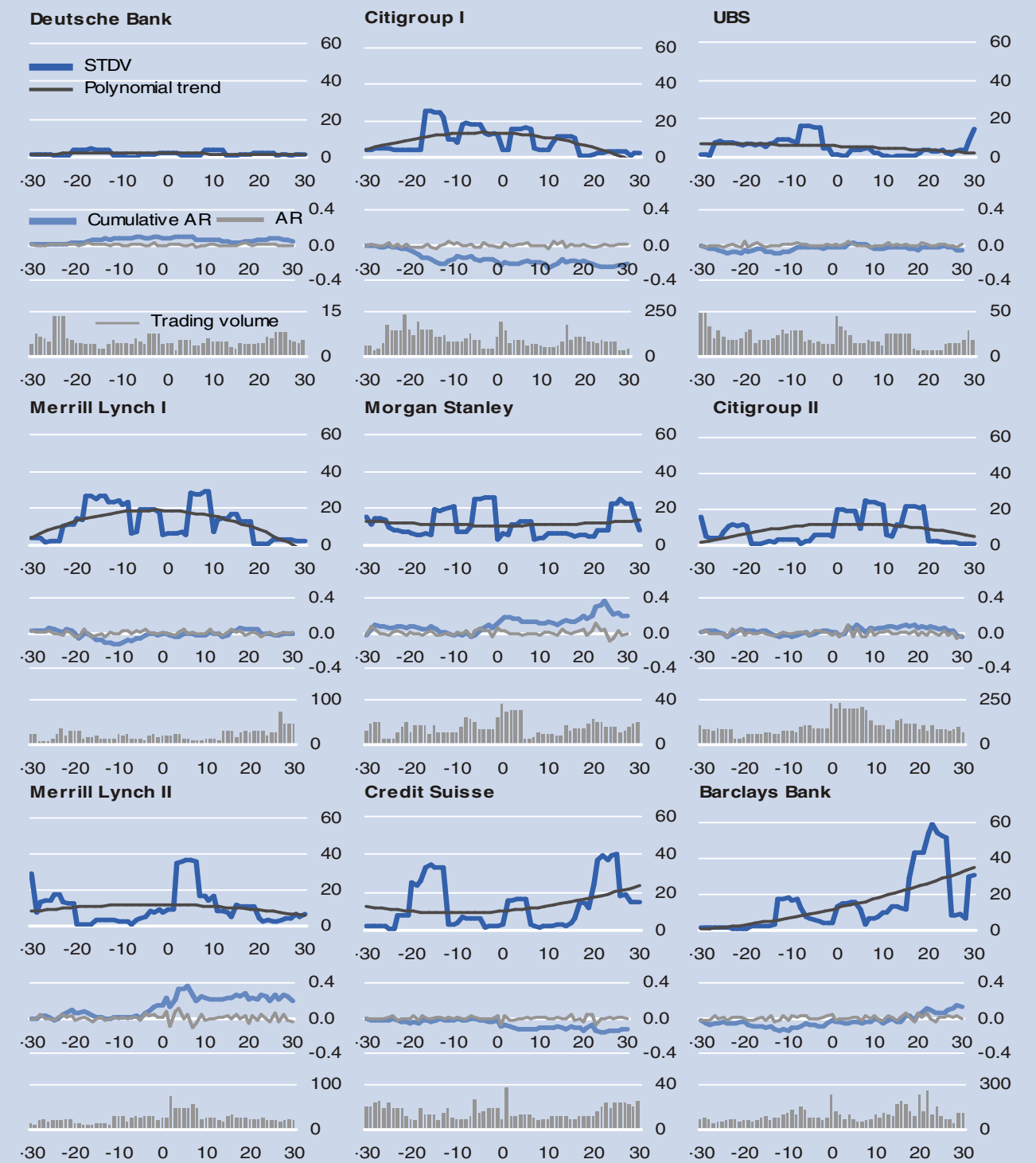
SWFs, and especially the well-established and highly professional ones, are understood to be acutely aware of the implications a fire-sale-type transaction can have on market conditions, and have been keen in the past to effect sales with great consideration. This observation has been validated empirically, although the conclusiveness of the evidence remains limited.¹⁵

¹⁴ Kotter et al. (2008) find that, in their sample of 163 SWF investments in 28 countries worldwide, stock markets react to SWF investments on the two days surrounding the announcement of an investment. The initial risk-adjusted stock market reaction has been calculated to amount to 2.1% on average.

¹⁵ Fidora et al. (2008) provide an econometric analysis of selected disinvestments undertaken by Norges Bank Investment Management, finding no significant effect on the performance of stocks. To what extent these findings can be generalised, however, is uncertain. This is because – owing to the general lack of data – it has only been possible to review disinvestment events with very low-volume transactions by one well-established SWF regarding non-financial institutions only.

Impact of SWF investments on shares prices and trading volumes

Impact of selected SWF investments*) on share prices and trading volumes within 30D prior to and after SWF investment: Standard deviations (STDV) in % from 5D moving average of share price and polynomial trend line, abnormal returns (AR) in %, and trading volumes in million shares.



*) Transaction details: Deutsche Bank: Investment by DIFC in Deutsche Bank. Amount invested: USD 1.4 bn. Share in equity capital: 2.2% Date: May 15, 2007. Citigroup I: Investment by ADIA in Citigroup. Amount invested: USD 7.5 bn. Share in equity capital: 4.9% Date: November 26, 2007. UBS: Investment by GIC in UBS. Amount invested: USD 9.7 bn. Share in equity capital: 9.0% Date: December 10, 2007. Merrill Lynch I: Investment by Temasek in Merrill Lynch. Amount invested: USD 5.0 bn. Share in equity capital: 9.9% Date: December 19, 2007. Morgan Stanley: Investment by CIC in Morgan Stanley. Amount invested: USD 5.0 bn. Share in equity capital: 9.9% Date: December 19, 2007. Citigroup II: Investment by GIC and KIA in Citigroup. Amount invested: USD 7.9 bn. Share in equity capital: 5.2% Date: January 14, 2008. Merrill Lynch II: Investment by KIA and KIC in Merrill Lynch. Amount invested: USD 8.9 bn. Share in equity capital: 5.4% Date: January 15, 2008. Credit Suisse: Investment by QIA in Credit Suisse. Amount invested: USD 0.5 bn. Share in equity capital: 2.0% Date: February 18, 2008. Barclays Bank: Investment by QIA in Barclays Bank. Amount invested: USD 3.5 bn. Share in equity capital: 8.9%. Date: 25 Jun 08.



SWF transparency influences other investors

Finally, the question arises whether the reaction of stock markets to SWF investments or divestments is in some way related to how much other market participants know about an SWF and how much information on its objectives and financial aims is openly available, i.e. how transparent an SWF is. As indicated earlier, there is a theoretical case to be made that stock market reactions, and especially over-reactions, depend on the extent to which the market suffers from information asymmetries about what other investors – individually or collectively – are doing. It is this concern over financial market stability that has given rise to the calls for greater transparency and stronger governance among SWFs. Importantly, empirical evidence suggests that the level of SWF transparency in fact influences the behaviour of other investors. Cross-sectoral research into SWF investments and stock market reactions shows that a fund's transparency has a statistically significant impact on stock returns, implying that other investors place higher trust in more transparent SWFs and tend to follow their investments more than those of less transparent funds.¹⁶

An optimal policy response: Principles for sound investment policies

- Open markets
- Symmetry in open market access
- Equal treatment of all foreign investors
- Proportionality of policy measures
- Transparency of policy rules
- Minimal political intervention
- International cooperation and standards (OECD)

An optimal policy response: Principles for SWF guidelines

- Transparency
 - Investment objectives
 - Portfolio size and structure
 - Fund resources
 - Defined or contingent liabilities
 - Financial leveraging
 - Institutional framework
 - External audit
- Governance
 - Commercial objectives
 - Independence from government
 - Good internal governance
 - Robust risk management
- Fair competition with private sector
- International cooperation and standards (IMF)

Policy responses – principles for SWFs and rules for foreign investments

The potential political and economic implications of cross-border investments by large state investors have sparked lively public debates in many parts of the world, the question being whether a political response was needed and, if so, in what shape.

Typically, these debates have been characterised by a wide variety of positions, ranging from laissez-faire approaches, rejecting government intervention and calling for liberal investment conditions, to protectionist reflexes, demanding rules restricting SWF activities and suggesting that foreign state investments should be strictly controlled in the recipient countries. Argumentation has been rendered more complex by the fact that a number of cross-cutting issues are involved. Thus, a liberalist may call for open investment conditions in his country, but may at the same time strongly reject investments by state actors, no matter whether they were domestic or foreign agencies. Conversely, a protectionist may not be concerned with investments made by state entities, but take issue with the fact that they originate in foreign countries. In addition, public reactions have been captured by other policy issues not strictly related to those of sovereign wealth funds, including broader economic concerns, labour issues, cultural questions, and the pros and cons of globalisation at large.

An economically efficient and realistic policy response requires a differentiated approach on the basis of which the potential benefits of foreign investments and open markets can be maximised. Accordingly, we have been proposing a principles-based approach – as summarised in the text boxes on the left – in both areas of policy-making, i.e. the provision of guidelines for SWFs and the development of rules for national policies governing foreign investments.

Despite the politically sensitive environment, the political outcome of the debate has in general been balanced, featuring a promising agreement at international level on joint principles for the conduct of SWFs and avoidance of a substantive protectionist backlash in the recipient countries.

¹⁶ Kotter et al. (2008).

SWF GAPP – The Santiago Principles

Generally Accepted Principles and Practices (GAPP) as agreed by the International Working Group of Sovereign Wealth Funds (IWG) and endorsed by the IMF's International Monetary and Financial Committee on October 11, 2008*

1. Sound **legal framework** for the SWF and its relations with other state bodies
2. Clearly defined **policy purpose**
3. **Coordination** with domestic fiscal and monetary authorities
4. Clear policies, rules, procedures, or arrangements regarding **funding**, withdrawal, spending operations
5. Timely **statistical reporting**
6. Sound **governance** to facilitate accountability and operational independence
7. Setting of **objectives**, appointment of governing bodies, oversight by owner
8. Clear **mandate**, adequate authority and competency for governing bodies
9. **Independent operational management**
10. Clearly defined **accountability** framework
11. **Annual report and financial statements** on operations and performance, in accordance with international or national accounting standards
12. Annual **audit** of operations and financial statements
13. Clearly defined professional and **ethical standards**
14. Dealing with **third parties** based on economic and financial grounds
15. Operations in **host countries** in compliance with all applicable regulatory and disclosure requirements
16. Public disclosure of **governance framework**, and provisions for operational independence
17. **Financial information** to be publicly disclosed
18. Investment policy based on **sound portfolio management principles**
19. Investment decisions to **maximize risk-adjusted financial returns** – or otherwise clear definition and public disclosure of other considerations
20. No seeking or taking advantage of **privileged information** or inappropriate influence by government in competing with private entities
21. Respect to **shareholder ownership** rights
22. Framework for **operational risk management**
23. **Reporting** of assets and investment
24. Regular review of GAPP **implementation**

* International Working Group of Sovereign Wealth Funds, *Sovereign Wealth Funds – Generally Accepted Principles and Practices*, Washington, October 11, 2008.

Guidelines for SWFs: Generally Agreed Principles and Practices

On October 11, 2008 the International Working Group of Sovereign Wealth Funds (IWG) issued the results of its work since its establishment on May 1, 2008. The IWG has presented a set of 24 Generally Accepted Principles and Practices (see text box), also known as the Santiago Principles, which are designed as a voluntary framework and which are subject to home country laws, regulations, requirements, and obligations. These should provide guidance for appropriate governance and accountability arrangements, as well as guide the conduct of appropriate investment practices on the part of SWFs.

Contents

With the GAPP, the IWG aims to further develop the level of transparency and quality of governance of SWFs worldwide, including a commitment to financial, non-political objectives. The principles draw on first findings by the IWG on the transparency and internal governance of SWFs (see charts 29 to 32) which suggest a wide variety of practices among SWFs. In terms of transparency, it seeks to improve knowledge of investment strategies, including details on the intended use of voting rights, risk management, and the use of financial leverage. Regarding governance, the GAPP are expected to aim at better information about organisational structures and processes, most importantly featuring a commitment to a separation of fund management and government. In addition, the IWG has submitted a proposal to establish a Standing Group of SWFs, with the aim of carrying forward the work relating to the GAPP, and of facilitating dialogue with official institutions and recipient countries on developments that impact SWF operations.

Assessment

Despite the breadth of the GAPP and their voluntary nature, their adoption no doubt marks a remarkable achievement on the part of the IMF and the members of the IWG, not least considering the political challenges on the way:

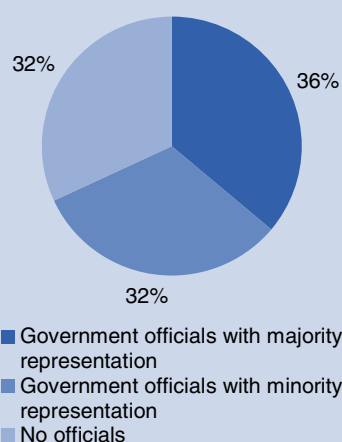
- **Prudent politics:** Mandated by the G7 finance ministers at the October 2007 meeting to examine policy options regarding SWFs, the IMF rightly decided not to pursue this course unilaterally and impose rules on a group of investors who by that time had already voiced their strong reservations against being regulated. In contrast, the IMF confined itself to identifying the critical issues that needed to be discussed and to drawing up a work agenda.¹⁷ Subsequently, it lay the formulation of joint principles and practices into the hands of the SWFs themselves, by establishing the IWG.

¹⁷ International Monetary Fund, *Sovereign Wealth Funds – A Work Agenda*, Washington, February 29, 2008.



Political status: Board composition

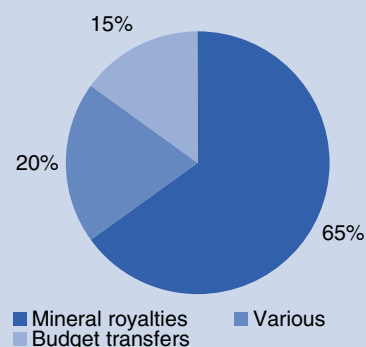
Composition of governing bodies, % of respondents



Source: IWG **29**

Sources of SWF funds

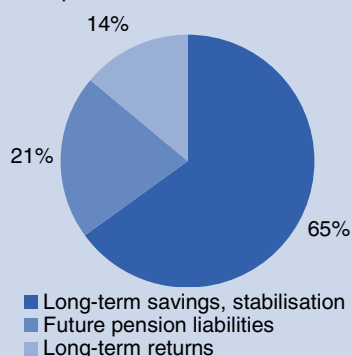
% of respondents



Source: IWG **30**

Objectives of SWFs

% of respondents



Source: IWG **31**

- **Mixed interests:** Within the IWG, a large number of players¹⁸ have met to discuss the prospects for joint principles. Some SWF representatives had presented their views on the emergence of the SWF policy debate in the US and Europe earlier on. These ranged from a willingness to cooperate to outright rejection. This in turn suggests that the IWG has internalised a heterogeneous group of actors and political views.
- **Broad consultation:** The IWG has not only encompassed a wide variety of SWF players but also managed to reach out to other key stakeholders, including the OECD, the World Bank, and the EU, in preparing its principles.
- **Time:** The negotiations have taken place in a very short period of time – less than six months.
- **Critical economic and political environment:** The negotiations have taken place against the background of an economic and political environment that was far from benign, including the financial crisis, high volatilities in commodities markets, and continued political instabilities in some of the participating states.

Key issues

The success of reaching preliminary agreement on the GAPP – assuming they will ultimately be adopted by the IWG and embraced by the International Monetary and Financial Committee – marks an important step.

Three critical questions need to be asked once the GAPP take effect:

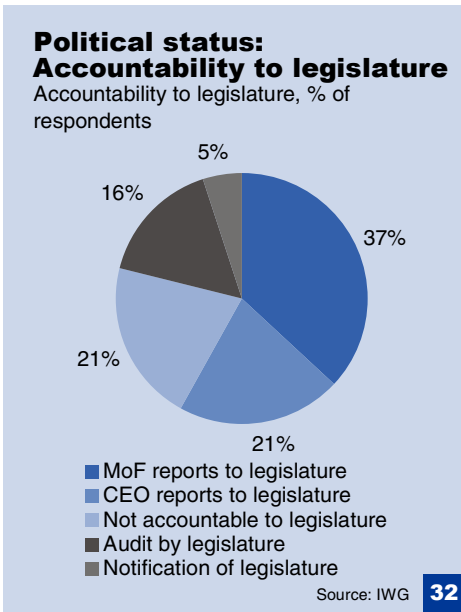
- **Fulfilling expectations of key stakeholders:** Can the GAPP satisfy the expectations of the various stakeholders, including policymakers in SWF home countries and in recipient economies, as well as market participants and the wider public?

If the GAPP fail to address the key concerns of the main parties to future investment transactions, there is a risk that they will become ineffective and SWFs will continue to face difficulties finding access to certain economies and being accepted as reliable institutional investors.

- **Securing broad support and adherence:** Will SWFs and the states that run them – participating in the IWG process or not – subscribe and adhere to these principles in practice?

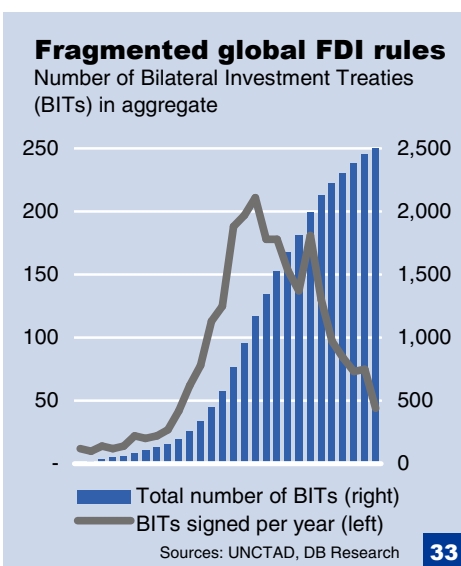
If an SWF decides not to embrace the GAPP, it will need to be seen whether that SWF will in practice be confronted with heightened political scrutiny or even resistance in the recipient economies compared to those SWFs participating in voluntary self-regulation as stipulated by the GAPP. In other words, subscribing to the GAPP could become a cachet among SWFs signalling to recipient economies that the entity is committed to financially-motivated investments and fulfils minimum standards in terms of transparency and governance.

¹⁸ Members: Australia, Azerbaijan, Bahrain, Botswana, Canada, Chile, China, Equatorial Guinea, Iran, Ireland, Korea, Kuwait, Libya, Mexico, New Zealand, Norway, Qatar, Russia, Singapore, Timor-Leste, Trinidad & Tobago, the United Arab Emirates, the United States. Permanent Observers: OECD, Oman, Saudi Arabia, Vietnam, the World Bank. Co-Chairs: Hamad al Suwaidi, Under Secretary of Finance of Abu Dhabi and a director of the Abu Dhabi Investment Authority (ADIA), Jaime Caruana, Director of the IMF's Monetary and Capital Markets Department.



Existing barriers to foreign investments

Lack of international rules for liberal investment regimes



— **Ensuring oversight and implementation:** Will the IWG and the IMF be able to succeed in overseeing and ensuring their implementation, or is there a risk that these voluntary commitments may remain unobserved in the countries to which they are particularly addressed?

If committing to the GAPP were to develop into a seal of quality, SWFs would need to back up their commitment with action. They should adhere to financial objectives and implement and apply transparency and governance standards in a way that can actually be monitored by all stakeholders. Establishing a standing group of sovereign wealth funds with a view to carrying forward the work relating to the GAPP and to facilitating dialogue with official institutions and recipient countries on developments that impact SWF operations can be an important measure in this regard.

The OECD and standards for investment policies in recipient countries

As progress is being made on guidelines for SWFs, the rationale for a more coordinated approach to rules governing the entry of foreign investments into the recipient countries is becoming stronger.

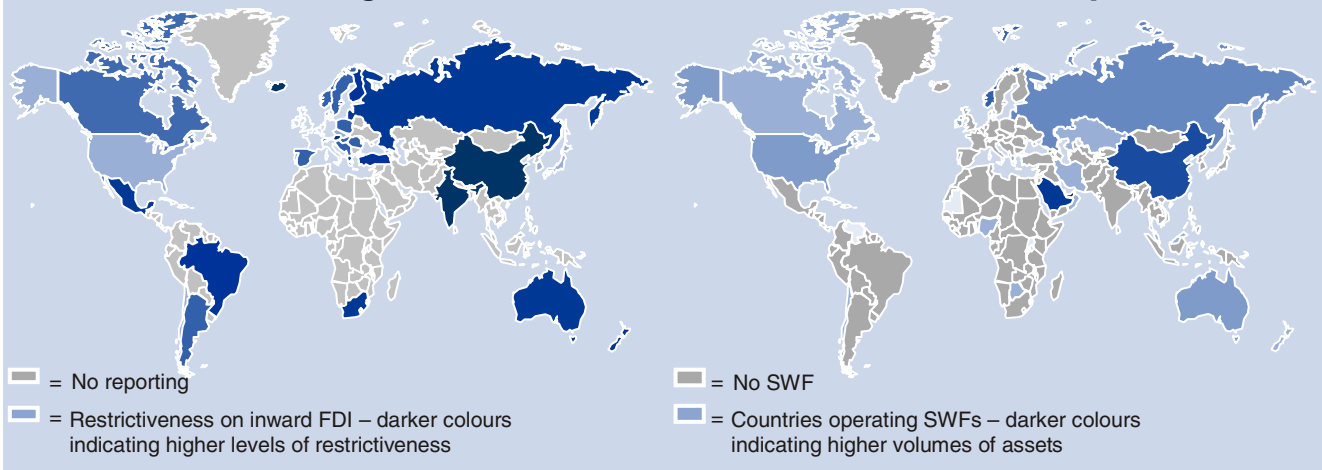
Without exception, countries around the world have rules in place regulating the entry of foreign capital and investment into the domestic economy. Such rules can take the direct form of outright prohibition or quantitative and qualitative limitations on foreign investments, capital controls, and vetting mechanisms for foreign investments. In addition, many countries maintain indirect checks on inward investments by means of corporate governance rules putting foreign owners at a competitive disadvantage, restrictions on foreign ownership of land and assets, differential product and production standards, discriminatory rules in competition policy, taxation and trade rules, and trade or restrictive licensing processes. Frequently, governments apply additional restrictions to industries they consider particularly sensitive in political or economic terms.

Combined, direct and indirect foreign investment rules result in most countries in high barriers to foreign investments, which in turn discourage competition and the inflow of valuable capital and know-how. In the end, such barriers can cause considerable economic damage by dragging the domestic economies below their growth potential, which illustrates that such restrictions usually are motivated by political considerations rather than economic thinking.

Aggravating this situation, there are no international agreements that provide national governments with guidelines, let alone binding rules, which encourage the liberalisation of investment regimes and the abolition of direct and indirect investment barriers, or that provide standards by which those rules and procedures deemed indispensable by governments for the protection of national interests can at least be designed with a minimum of distortive fallout. In addition, there is a growing number of international and bilateral agreements which – while useful per se for facilitating cross-border capital flows – further fragment the operational environment for international investments. As of end-2006, there were almost 5,500 international investment agreements (IIAs), including more than 2,500 bilateral investment treaties, more than 2,600 double taxation treaties and almost 250 free trade agreements.

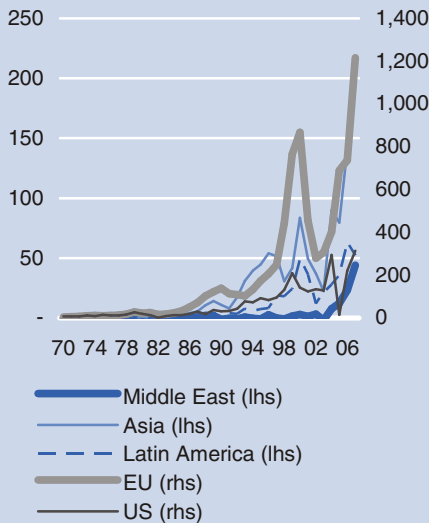
In practice, economies worldwide are separated from each other in terms of foreign investments by substantial regulatory barriers. This

Restrictiveness on foreign investments and SWF asset distribution in comparison



Outward FDI growth

Global foreign investment growth, FDI outward flows, USD bn



Sources: UNCTAD, DB Research

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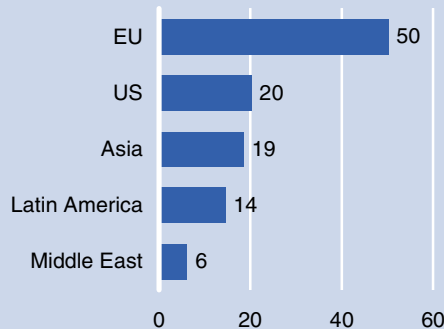
discourages important investments, or – if they are undertaken notwithstanding – substantially raises the cost, especially considering that the barriers differ widely from country to country and no general patterns exist.

The severity of investment barriers has been measured across various categories of direct and indirect hurdles as well as sectors. The EU and its member states are, on average, the most open and liberal economies in the world, with Latvia, Belgium, Germany, the UK, Italy, the Netherlands, Ireland, Lithuania and France leading the field. Japan, the US and other industrial and emerging economies follow. Russia, India and China are the most restrictive countries.

Paradoxically, a comparison of the degree of restrictiveness on foreign direct investments versus the volumes of sovereign assets at issue suggests that it is particularly countries with extensive state-owned funds at their disposal which currently maintain the strictest regimes when it comes to preventing foreign investment from entering their domestic markets. This coincides with the growth potential in many of these economies for private-sector foreign investments. In many emerging markets, private enterprises have not only become major players in their respective industries by international comparison but also truly global players. While this has mainly been manifested in their extensive trading activities, multinational enterprises from emerging markets are increasingly becoming global investors, seeking ownership in financial and real assets in neighbouring emerging economies but also in traditional industrialised economies. This trend is likely to continue, as emerging economies are only getting started as global investors. If so, the asymmetry in market access between the open economies of the EU and North America and those in the emerging markets is set to become even more pronounced.

FDI - economic importance

Outward FDI stock as % of GDP, 2007



Sources: UNCTAD, DB Research

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With protectionist reflexes against foreign state investors in potential recipient countries looming, the finance ministers of the G7 called on the OECD in autumn 2007 to examine possibilities to provide principles for foreign investment policies, such as non-discrimination, transparency, and predictability. This new mandate has been complementary to the OECD’s long-standing efforts at tackling investment barriers and the differences in the way foreign investments are controlled in individual states. In response, the OECD’s Investment Committee on April 4, 2008 issued an interim report on “Sovereign

OECD guidance for security-related measures

- **Non-discrimination.**
- **Transparency and predictability,** including (i) the codification and publication of investment rules, (ii) prior notification in case of changes of investment rules, (iii) consultation of interested parties when changing investment policies, (iv) procedural fairness and predictability, including strict time limits to review procedures, (v) protection of commercially sensitive information provided by the investor, (vi) disclosure of investment policy actions.
- **Regulatory proportionality** for restrictions on investment and conditions on transactions, which should not be greater than needed to protect national security, including (i) provision of a clear rationale and identification of a clear relationship between investment restrictions and national security risks, (ii) narrow focus on concerns related to national security, (iii) appropriate expertise to be applied when reviewing and judging transactions, (iv) tailored responses for individual transactions, preferably using risk mitigation agreements, (v) last-resort approach to investment measures, which should be applied only if other options (sectoral licensing, competition policy, financial market regulation) have been exhausted.
- **Accountability,** including procedures for parliamentary oversight, judicial review, periodic regulatory impact assessment, and high-level decision making.

Source: Organisation for Economic Development and Cooperation, *Sovereign Wealth Funds and Recipient Country Policies*, OECD Investment Committee Report, Paris, April 4, 2008.

OECD action expected by mid-2009

Wealth Funds and Recipient Country Policies"¹⁹, and is intending to present in 2009 a final report which is currently being drafted in the context of its Freedom of Investment Project.

Contents

In its interim report, the OECD Investment Committee appreciated the growing role of sovereign investors and highlighted the solid basis of existing principles and process to ensure free capital movements. In particular, the Committee stressed the following points:

- **Benefits of SWF investments welcome:** The OECD welcomes the benefits of SWF investments, including the stabilising effects of SWF investments in financial institutions, the stimulating economic effects in recipient countries, the international recycling of savings, their good track record as long-term investors, and their contribution to the economic development of their home countries.
- **Established investment policy principles:** Existing OECD investment instruments already contain fundamental principles that reflect the common understanding of fair treatment of foreign investors and the need to build this understanding into national investment policies and to provide for a peer review among the countries that have committed to these principles. The principles include:
 - Non-discrimination of foreign investors
 - Transparency of investment restrictions
 - Progressive liberalisation of restrictions on capital movements
 - Standstill clause for prevention of new restrictions
 - Unilateral liberalisation and avoidance of reciprocity
- **National security legitimate concern:** The OECD recognises the right of member countries to take actions they consider necessary to protect national security. However, the national security clause of the OECD investment instruments should be applied with restraint.
- **National security measures need principles:** Despite the conceded general legitimacy of security-related policy measures, the OECD – in the context of its project on “Freedom of Investment, National Security and Strategic Industries” – is discussing the appropriate means by which such interests can be addressed without impairing market openness. Although final results of the project are pending, the participants in the project have agreed on key principles which should guide governments in designing security-related investment policies (see text box).

The OECD Investment Committee seeks to finalise the work in the context of the Freedom of Investment project by mid-2009, and expects to be issuing a menu of best practices on the basis of the established principles, complemented with suggestions for revisions and clarifications to existing OECD instruments.

These instruments include a wide range of OECD codes, declarations and explanatory documents, most importantly including:

¹⁹ Organisation for Economic Development and Cooperation, *Sovereign Wealth Funds and Recipient Country Policies*, OECD Investment Committee Report, Paris, April 4, 2008

SWF transparency and governance

Country	Fund	Score
NZ	New Zealand Superannuation Fund	95
US	Alaska Permanent Reserve Fund Corporation (APRF)	94
NO	Norges Bank Investment Management (NBIM)	92
US	Permanent Wyoming Mineral Trust Fund (PWMTF)	91
IE	National Pensions Reserve Fund (NPRF)	86
US	New Mexico State Investment Office Trust Funds	86
AU	Australian Government Future Fund (AGFF)	80
TL	Timor-Leste Petroleum Fund	80
AZ	State Oil Fund of the Republic of Azerbaijan (SOFAZ)	77
CA	Alberta Heritage Savings Trust Fund	74
CL	Economic and Social Stabilization Fund (ESSF)	71
CL	Chile Pension Reserves Fund	71
HK	Hong Kong Monetary Authority Investment Portfolio	67
KZ	Kazakhstan National Fund (KNF)	64
BW	Pula Fund	55
TT	Heritage and Stabilisation Fund	53
RU	Stabilisation Fund of the Russian Federation (SFRF) - Reserve Fund	51
SK	Korea Investment Corporation (KIC)	51
KW	Kuwait Investment Authority (KIA)	48
ST	National Oil Account	48
MX	Oil Income Stabilisation Fund	47
SG	Temasek Holdings Ltd.	45
SG	Government of Singapore Investment Corporation (GIC)	41
KY	Khazanah Nasional Berhad (KNB)	38
CN	China Investment Corporation, CIC	29
KI	Revenue Equalisation Reserve Fund (RERF)	29
DZ	Fonds de Régulation des Recettes	27
NG	Excess Crude Account	26
IR	Foreign Exchange Reserve Fund	23
VZ	Investment Fund for Macroeconomic Stabilization (FIEM)	23
OM	State General Stabilisation Fund (SGSF)	20
SD	Oil Revenue Stabilisation Account	20
BN	Brunei Investment Agency (BIA)	18
AE	Mubadala Development Company Abu Dhabi	15
AE	Istithmar Dubai	14
AE	Abu Dhabi Investment Authority (ADIA)	9
QA	Qatar Investment Authority, QIA	9

Note: "Score" = Assessment of each fund in terms of transparency and governance. Criteria: Structure, governance, accountability, transparency, behaviour. Aggregate score, % of maximum possible points.

Source: Truman (2008)

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- OECD Code of Liberalisation of Capital Movements, adopted in 1961,
- OECD Declaration on International Investment and Multinational Enterprises of 1976, as revised in 2000,
- procedures for notification and multilateral surveillance under the broad oversight of the OECD's Governing Council to ensure their observance,
- various guidelines, including a Policy Framework for Investment, a Framework for Investment Policy Transparency, and a Checklist for Foreign Direct Investment Incentive Policies.

Key issues

Promoting open investment conditions and standards for investment policies has been a very delicate political issue in the past, also for the OECD. This was most vividly documented by its attempt to develop a multilateral framework for more systematic and uniform international investment rules by means of the Multilateral Agreement on Investment, which it negotiated between 1995 and 1998 and which eventually failed under pressure from various sides. The debate in recipient countries about foreign sovereign investments has brought the issue back to national and international political agendas. This revival has been characterised by reservations regarding market openness, and the fact that SWFs have channelled funds into the financial industry when these investments were badly needed may have only temporarily eased the underlying concerns.

Promoting open investment regimes has become all the more important, especially for two reasons. One is that liberalising investment regimes is not primarily about sovereign investors, but about creating growth opportunities for the private sector, where the concerns about sovereign investors have no relevance. The other is that investment measures targeted at state investors often have negative spill-over effects for private investors, in particular when investment laws do not or only insufficiently distinguish between these two types of investor.

Not surprisingly, going beyond very broad, non-binding guidelines for investment is therefore just as difficult today as back then. And even though the OECD in the meantime has drawn up a consistent set of principles on investment policies and intensified the dialogue between its member countries in order to promote a more coherent approach internationally, current and future efforts will be strongly influenced by key political problems:

- **Political climate:** Following the benign international conditions in the 1990s in which international and multilateral economic agreements towards a more liberal market environment enjoyed substantial political acceptability, further market opening has faced increasing opposition in recent years and months. General concerns over the impact of globalisation and concrete national and sectoral protectionist interests in many economies have considerably weakened the political momentum for further liberalisation of capital movements.
- **Commitment, implementation, enforcement:** Even if the OECD member states agree on guidelines for investment policies next year, such guidelines will be no more than just that, effectively leaving political application to national governments, so that the degrees of commitment and the ways of implementation and enforcement are likely to vary. As laudable as the

Binding WTO-type rules on foreign investments needed

OECD's efforts are, the recent dramatic rise in the economic importance and volumes of foreign investments warrants a much stronger commitment by national governments that should result in binding rules along the lines of trade agreements under the WTO.

- **Symmetry of market access:** As already pointed out, cross-border investments not only suffer from high regulatory barriers *per se*, but also from the asymmetric way in which many economies pursue foreign investments and benefit from open markets elsewhere while maintaining restrictive rules on inward investment. This is counterproductive, and policymakers should work towards reducing these asymmetries.
- **Scope:** Closely related to the latter issue, OECD-based guidelines have only a limited geographical reach. Given the membership of the OECD, any guidelines coming out of the OECD process will primarily address the traditional industrialised countries.²⁰ Against this background, it would be desirable if in practice such guidelines had wider-reaching effects, becoming recognised as yardsticks for investment policies in countries outside the OECD, too. The OECD may therefore find it useful to promote its guidelines not only among its own membership, but also to consider ways in which such standards can be discussed with emerging market governments.

National foreign investment rules

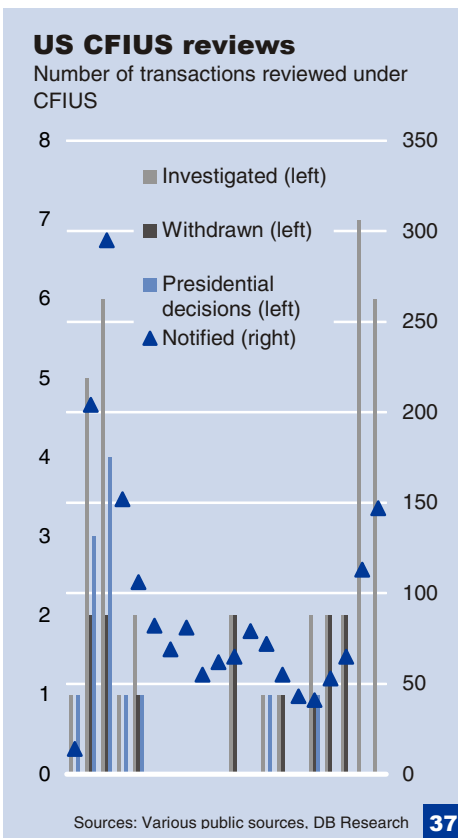
While the OECD has been drafting its refined guidelines, work on the investment policies in the member states – at which these guidelines are targeted – has been progressing. These efforts have not least been sparked off by the concerns in the recipient countries over the impact of SWF investment in industrialised economies.

While – owing to the emergence of the policy issue – debates on establishing review processes for foreign investments or reforming existing investment rules have arisen in a number of countries, legislative or regulatory initiatives leading to concrete changes in market entry conditions have occurred only in four major economies over the past year, namely the US, Australia, Russia, and Germany. These developments will be briefly reviewed below. The annex of this publication provides an extensive overview of the investment policies in place in 12 major international economies.

United States

The United States' review process for foreign investments – undertaken by the Committee on Foreign Investments in the United States (CFIUS) – was amended in 2007 to accommodate concerns that the process in its previous form had been ineffective and too lenient. The amending Foreign Investment and National Security Act (FINSA) was signed by the president on July 26, 2007 (P.L. 110-49), and the implementing Executive Order (E.O. 13456) was issued on January 23, 2008.

Importantly, FINSA codifies the CFIUS review process itself as well as a number of related practices.



²⁰ Member countries of the OECD: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States.

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continued

- **Covered transactions:** FINSA extends the range of transactions open to CFIUS review. Any merger, acquisition or takeover that could result in foreign control of an entity engaged in US interstate commerce may be reviewed for national security concerns, and CFIUS must review any transaction in which the acquirer is a foreign government or an entity controlled by a foreign government.
 - **Lead agency:** The Department of Treasury maintains its gatekeeper and liaison functions. FINSA codifies CFIUS' practice that Treasury designates a CFIUS member agency to take the lead on behalf of the Committee in connection with a proposed transaction.
 - **Membership:** FINSA extends the membership of CFIUS, now encompassing Treasury as the chairing agency, Homeland Security, Defense, State, Justice, Energy, and – in non-voting capacity – Labor and the Director of National Intelligence.
 - **Concept of national security:** FINSA formally expands the definition of “national security” so as to include transactions involving critical infrastructure, energy assets and critical technologies.
 - **Investigation:** CFIUS is now formally designated a 45-day investigation period.
 - **Congressional oversight:** FINSA increases Congressional oversight, requiring (i) written notices by CFIUS to Congress at the completion of a review or investigation, and (ii) an annual report to Congress on its activities.
 - **Mitigation measures:** FINSA formalises the statutory authority for mitigation measures. The lead agency monitors the compliance with mitigation measures and provides reports.
 - **Evergreen provision:** FINSA enables CFIUS to reopen a reviewed transaction if mitigation measures are materially breached.
- On the basis of these amendments to Section 721 of the Defense Production Act of 1950, CFIUS has been mandated to further specify procedures, definitions and other relevant details. CFIUS, on April 21, 2008, issued a set of “Regulations Pertaining to the Mergers, Acquisitions, and Takeovers by Foreign Persons” which were open to consultation and triggered 26 written public submissions from various sides, and which are expected to be finalised in the course of 2008. The Regulations, again mostly implementing existing practices, cover a number of issues of importance:
- **Trigger value:** While the CFIUS process can be invoked whenever control of a US business is acquired, the regulations are likely to substantially lower the bar for what constitutes control, as they clearly state that acquisition of control can take place at any ownership level.
 - **Criteria for review:** Definition of “critical infrastructure” and “critical technologies” as listed for CFIUS review under FINSA.
 - **Procedures:** Specification of filing and reporting deadlines.
 - **Documentation requirements:** Specification of documentation necessary for a complete notice, including personally identifying information of senior executives, officers and certain shareholders, detailed information on market share, downstream users of products and the organisational structure of the buyer.

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Australia: Principle for treatment of foreign state investors...

- **Penalties:** Provision of civil penalties for intentional material misstatement or omission, false certification or violation of a material condition of a mitigation agreement.

In summary, the FINSA reform, complemented by the implementing regulations proposed by CFIUS, has clearly sharpened CFIUS as a policy instrument. While the strengthening of transparency and accountability of the process can be considered a positive side-effect, the formalisation and extension of the review mechanism have clearly raised the complexity of CFIUS, making it one of the most demanding foreign investment processes among the industrialised economies – not least for sovereign investors.

Australia

Australia has maintained a foreign investment screening process since 1975, as introduced by the Foreign Acquisitions and Takeovers Act, Act No. 92 of 1975. The purpose of that process is to ensure that foreign investment in Australia is consistent with the national interest. The process requires that significant foreign investment proposals including all investments by a foreign government or its agencies be notified to the government and examined by the Foreign Investment Review Board (FIRB). The FIRB plays an advisory role in this process while final authority rests with the Treasurer, who can reject proposals deemed contrary to the national interest or impose conditions on them to address national interest concerns.

Regarding the concept of national interest, the FIRB examines whether foreign investments may have adverse implications for national security or economic development. The FIRB is mandated to ensure that the investments are consistent with any specific legislation in areas such as transport and telecommunications. It also examines whether proposals have implications for other government policies, competition and for the operations of Australian businesses.

In February 2008, Treasurer Wayne Swan released a set of principles²¹ to enhance the transparency of the country's existing foreign investment screening regime. The aim of the principles is to specify the main factors considered in determining whether particular investments by foreign governments and their agencies are consistent with Australia's national interest.

Focusing on investments by foreign governments and their agencies only, the release contains the following six criteria:

- **Investor independence:** (i) Investor's operational independence from the relevant foreign government. (ii) Governance arrangements which could facilitate actual or potential control by a foreign government. (iii) Size and composition of any government interests, including any restrictions on governance rights.
- **Laws and standards of business behaviour:** (i) Clear commercial objectives on the part of the investor. (ii) Investor is subject to adequate and transparent regulation and supervision in other jurisdictions, including corporate governance practices of foreign government investors. (iii) SWF investment policy and how it proposes to exercise voting power in relation to Australian companies.

²¹ Principles Guiding Consideration of Foreign Government Related Investment in Australia, Media Release No. 009, Government Improves Transparency of Foreign Investment Screening Process, Treasurer of the Commonwealth of Australia, February 17, 2008.



- **Competition:** (i) Impact on competition. (ii) Impact on concentration or control in the industry or sectors concerned.
- **Government policies:** (i) Impact on Australian government revenue or other policies. (ii) Equal treatment in taxation. (iii) Consistency with government's objectives in relation to other matters, including environmental policies.
- **National security:** Extent to which investments might affect Australia's ability to protect its strategic and security interests.
- **Australian business:** (i) Impact on operations and directions of an Australian business. (ii) Contribution to the Australian economy and broader community. (iii) Plans by an acquiring entity to restructure an Australian business following its acquisition. (iv) Impact on imports, exports, local processing of materials, research and development and industrial relations. (v) Extent of Australian participation in ownership, control and management of an enterprise that would remain after a foreign investment, including the interests of employees, creditors and other stakeholders.

... not confined to security interests

Even though none of the principles issued by the Treasurer in early 2008 establishes qualitatively new criteria or entry barriers for foreign state investors, the intervention clearly set the tone for investment policies at a time when the Australian public was, and still is, particularly concerned about the entry of foreign state investors in the areas of natural resources, commodities, ownership and exploration rights as well as processing.

Unlike the policy measures in the US and Germany, the Australian approach makes broader economic and societal interests explicit components of its review criteria, and does not confine itself to questions of national security.

Russia

Russia: New law specifies 42 strategic sectors...

Following extensive debates over the past years on ways to protect strategic industries, the Duma in May 2008 passed the new Federal Law of the Russian Federation on Foreign Investments in Companies Having Strategic Importance for State Security and Defence.²²

The law establishes a process of approval of foreign investments in strategic sectors in Russia, featuring the following procedures:

... for special scrutiny by government

- **Strategic sectors:** The law specifies 42 activities that have strategic significance for national defence and state security, grouped into eight main areas: (i) Nuclear materials, devices, waste. (ii) Coding and cryptographic equipment. (iii) Weapons and military equipment and technology. (iv) Aviation and space. (v) Television, radio broadcasting, printed mass media. (vi) Natural monopolies. (vii) Telecoms. (viii) Geological survey and exploration and development of subsoil areas of federal significance.

Tightened conditions for foreign investments...

- **Trigger values:** Definition of thresholds that require approval, including most importantly a general threshold for corporate control for stakes larger than 50%, as well as lower thresholds for certain sectors, especially regarding commodities ownership and exploration rights.

²² Federal Law of the Russian Federation on Foreign Investments in Companies Having Strategic Importance for State Security and Defence, No. 57- FZ, signed by the president on April 29, and effective from May 7, 2008.

- **Approval process:** (i) Approval process operated by an authorised institution, most likely the Federal Antimonopoly Service (FAS). (ii) The authorised body is mandated with receiving and reviewing application and supporting documents, making a preliminary determination whether approval is required, coordinating the application with the Federal Security Service (FSB) and other governmental bodies, and with presenting its decision and the supporting documentation to a governmental commission which will be chaired by the prime minister for final decision. (iii) The governmental commission can approve or decline a transaction or impose conditions. (iv) The authorised body has 14 days to make its initial consideration and circulate the application to the other relevant agencies, followed by 30 days of comprehensive review of the strategic company (including licences to carry out strategic activities, access rights to state secrets, permits for dual-purpose goods, etc.) and for other state agencies to give their input. The commission has 30 days to issue its decision. In certain cases, the process may be extended to six months in total.
- **Notification requirements:** Foreign investors acquiring 5% or more of the shares of a strategic company must report the acquisition to the authorised body.
- **Sanctions:** Sanctions for violation of the law include nullification of the acquisition, loss of voting rights, and invalidation of subsequent decisions of the management bodies and subsequent transactions of the strategic company.

... complemented by additional sector-specific constraints

The new law marks a substantial tightening of conditions for foreign investments in the Russian Federation, especially in the strategic sectors identified by the new rules. In addition, it has to be recalled that investments in areas outside the realm of the strategic sectors ringfenced by the new laws are regulated by a number of existing general or sectoral rules, which are tight by international standards. As a result, the Russian investment framework belongs to the most restrictive regimes worldwide, as reflected in the OECD's measures for market openness in which Russia – already prior to the additional restrictions in the new law – ranked third last.

Germany

Germany: Light regulatory regime...

Germany's proposals for responding to foreign state investments belong to the most widely noted developments in this policy area; nonetheless, the proposed law that emerged from this debate is certainly one of the most overrated political measures of the past months.

... for investments leading to higher than 25% stake

To cut it short, the proposed law²³ is not nearly as restrictive as argued by some. At the same time, there is no denying that the government's draft entails a number of shortcomings which may become a burden for the country as an investment location, and for its reputation as an open and liberal business environment. The proposed law envisages the following arrangements:

- **Scope:** Any investments by foreign subjects leading to a stake in a listed or unlisted German company of more than 25%, including direct and indirect holdings as well as voting rights of third parties with whom an agreement on joint voting has been concluded by any foreign subject from outside the EU or EFTA.

²³ *Entwurf eines Dreizehnten Gesetzes zur Änderung des Außenwirtschaftsgesetzes und der Außenwirtschaftsverordnung.* Government Draft as published on August 20, 2008.

Reviews only on basis of security concerns

- **Strategic sectors:** No strategic sectors specified.
- **Review criteria:** Public order or security of the country.
- **Competent authority:** The review process will be operated by the Federal Ministry of Economics and Technology. The ministry will consult other relevant ministries and bodies on whether to open an investigation and whether to approve a transaction. The final decision – in case the ministry recommends a transaction should be rejected or approved with conditions – rests with the federal government.
- **Process:** (i) Within three months after conclusion of a purchase contract, the ministry can decide whether the transaction could endanger public order or security. (ii) Once notified that the ministry will review the transaction, the acquirer is obliged to make any relevant material on the transaction available. (iii) Starting with the notification, the ministry has two months to reject or impose conditions. Otherwise, the transaction is considered cleared. (iv) Rejections or conditional permissions have to be approved by the federal government.
- **Conditions:** The government can approve a transaction with conditions. These conditions may take the form of (i) a prohibition or limitation of the exercise of voting rights in the acquired company, (ii) the appointment of a trustee to reverse the transaction.

New law unlikely to harm top position on market openness

The draft law can best be characterised as a lightweight version of America's CFIUS review process. With its high trigger value of 25%, a generally lean review process, and its clear structure, the proposed investment measure is certainly one of the least restrictive in an international comparison. Germany currently enjoys the position of being the most open investment location among the large industrialised countries in the world²⁴. The proposed law, once in force, is unlikely to discourage commercially-motivated foreign investments – be they by private or state investors. And it is therefore also unlikely that it will harm the country's competitive position in terms of market openness by international standards.

Liberal spirit of the law needs to be applied in practice

The overall design of the draft review process represents an appropriate policy response to the challenges as perceived by public policymakers. However, this cannot belie the fact that the draft currently contains a number of shortcomings that should be rectified in the course of parliamentary deliberations before its adoption. Otherwise, it cannot be excluded that the review process may turn out to cast a shadow on Germany's attractiveness as a business location.

- **Duration:** The draft foresees a maximum duration of the review process of five months, consisting of three months for the enquiry into whether a formal review should be initiated and two months for the review itself.

This contrasts with a total of only three months in the US, for instance, where CFIUS has a one-month notification period, 45 days for review and a maximum of 15 days for presidential review.

In other words, the planned German review process may take up to two months longer than that of the most important yardstick, implying greater legal uncertainty, higher costs and competitive

²⁴ The country ranks third best in terms of FDI restrictiveness as measured by the OECD, outperformed only by Latvia and Belgium.

Duration of review process most serious shortcoming in draft law

disadvantages vis-à-vis the US. A shortening of the individual phases should be an important objective in the consultations ahead.

Optimally, the review process would allow for one month of enquiry and one month for the formal review. The enquiry and the review entail a number of important and complex evaluations and require thoughtful judgments on the part of the ministry and other authorities involved. The two one-month periods, however, would in practice suffice to undertake these important duties with the appropriate care.

- **Confidentiality:** Confidentiality plays an important role in investment transactions, especially in mergers and acquisitions. Breaches in confidentiality more often than not lead to serious disruptions of such projects and in many cases to their failure.

Confidentiality should therefore be an important concern of any investment law and should be guaranteed throughout the review process, especially in cases when investors seek pre-approval for a non-disclosed transaction. A clause explicitly highlighting the commitment to confidentiality of the public authorities involved in the process would therefore be a valuable addition to the law.

In the final analysis, the quality of the new law can only be judged by the way it is applied in practice. The law's stipulations are at a comparably general level, and especially the review criteria – public order and the security of the country – leave a wide margin of discretion for application by the ministry.

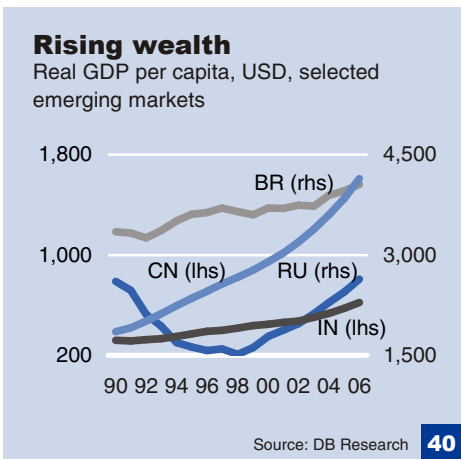
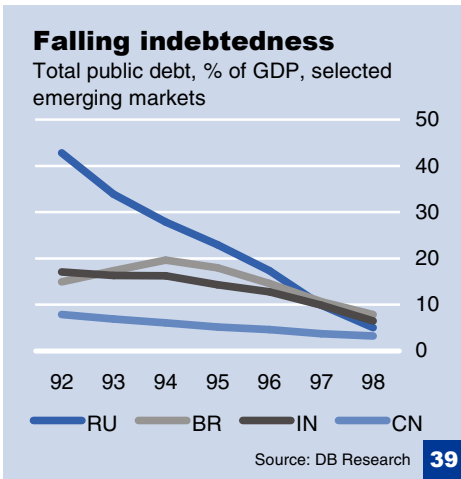
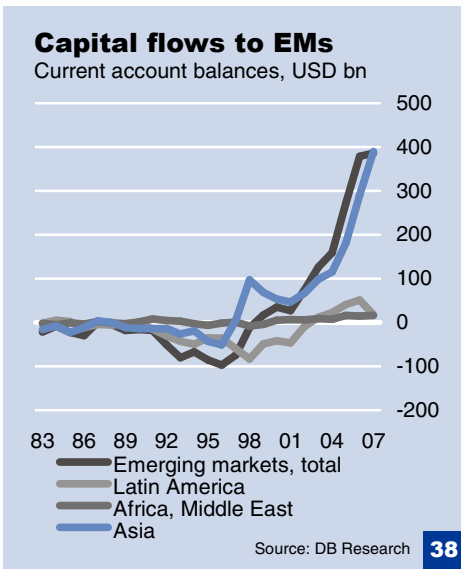
Optimally, the process would and should be invoked in as few cases as possible, and certainly only in circumstances where a material threat to public order or security can be detected. In the interest of Germany's attractiveness as a business location and its credibility as an open market economy, any attempts to abuse the process for political purposes or for protectionist business interests must be discouraged from day one.

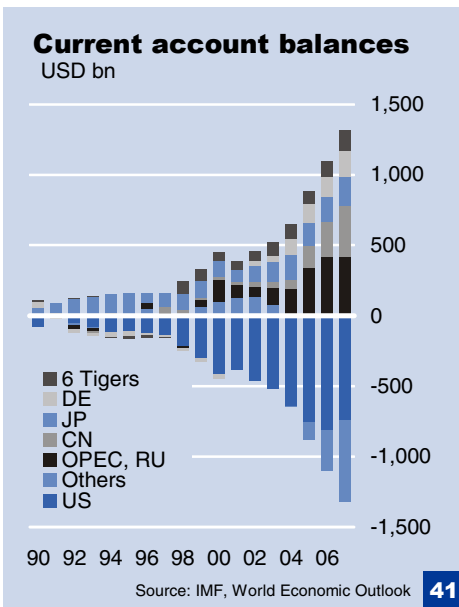
The global perspective

To conclude this discussion on SWFs and investment policies, it is worthwhile to put the debate into a global perspective. After all, it touches upon a number of issues with far-reaching implications, such as the relations between traditional industrialised economies and emerging markets, capital flows and global economic imbalances, the role of the state in the economy, cross-border investment and ownership of assets.

A new wave of globalisation...

It appears useful to think of SWFs and their investments as one facet of a new phase of globalisation. The wave of internationalisation in the nineteenth century and the first phase of globalisation in the latter half of the twentieth century had seen the rise of international trade in goods and services, of foreign investments, mainly originating from industrialised countries, and the emergence of multinational enterprises. The second wave of globalisation, especially in the 1980s and 1990s, saw the internationalisation of production of goods and services, with the off-shoring of labour-intensive work processes into lower-cost economies.





The current phase of globalisation is about ownership of assets globally and a new quality in terms of the participation of emerging markets in the global economy. As many emerging markets have made tremendous economic progress in recent years and are becoming wealthier, private individuals and public institutions in these economies are increasingly engaging in international investments. This has boosted capital flows from the emerging economies to the traditional industrialised economies and resulted in greater and more active participation in global capital markets.

Both are positive and highly welcome developments, considering that – owing to the economic realities in earlier phases of globalisation – capital had traditionally flowed from the industrialised countries into the emerging markets. The growing international investments by emerging markets are likely to help them achieve a more established role in world finance which is more commensurate with their importance in the global economy.

... is gaining momentum...

To be sure, these indicators of a growing engagement of emerging markets in global capital flows and asset ownership are early signals, and emerging markets still have some way to go before they challenge the long-standing position of the US and Europe in global capital markets and investments flows.

SWFs are, in fact, a suitable example. Their total assets under management – currently at USD 3.6 tr – appear small when compared with the size of other classes of institutional investors, for example USD 16 tr of insurance company assets, USD 17 tr of pension fund assets, USD 26 tr of investment fund assets, or a total of USD 74 tr of bank assets. SWFs reportedly participated in investments totalling USD 73 bn in 2007. Even though the total volume including unreported transactions is likely to be substantially higher, these volumes are dwarfed by the USD 899 bn of private capital flows into the emerging markets on a net basis alone in the same year. Similarly, foreign direct investments originating in Asia and the Middle East amount to no more than 10% of the global total.

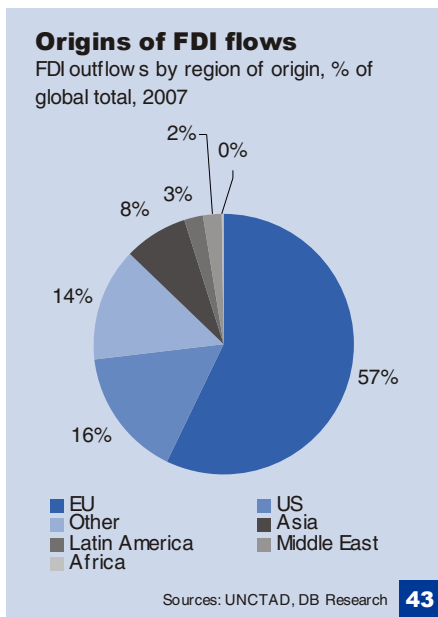
... and calls for early, joint policy approaches

Still, investments from the emerging markets are growing very fast, and their weight in global capital markets is likely to increase significantly – not least considering the comparative strength and resilience being exhibited by most of the emerging players during the financial crisis to date.

Foreseeable economic developments of this kind and magnitude call for early and coordinated policy approaches. The IMF's co-ordinating strategy on SWF transparency and governance is a very positive example of how a swift and targeted policy response brought emerging markets to the negotiating table, actually making them the drivers of the process.

If SWFs can be regarded as harbingers of the growing international involvement of emerging markets in global economics and finance, their case illustrates that an intensification of the dialogue increases the chances of achieving mutually acceptable policy outcomes. Ultimately, there will be a need for stronger participation of the emerging markets in international economic and financial policymaking and diplomacy. Their participation will be an important precondition for reaching joint rules in globalised capital markets.





The financial crisis shows how profoundly the rules of the game have changed already. Only ten years back, during the 1997 Asian crisis, it would have been inconceivable that, one day, emerging market governments and their sovereign funds would be courted by large Wall Street banks to provide capital and thus save them from a more severe downfall, as has happened in the past few months. Given the fragility of the current situation, it cannot be excluded that – in case there is a serious further deterioration of financial conditions and increasing government involvement in their resolution – sovereign funds, including the emerging markets, may turn out to play an even more prominent role than already observed. If these new realities prove to be of a lasting nature, and the chances of this are high, then expect rapidly increasing pressures on international economic and financial policymakers to draft plans to address future contingencies, and grant emerging players an appropriate place in the international policy arena. The fact that the G7 finance ministers have decided to take their consultations on the resolution of the financial crisis into the G20 may be an important signal in this regard.

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Annex: Investment regimes in international comparison²⁵

Australia	
Process	– Foreign Investment Review Board (FIRB) screening
Legal basis	– Foreign Acquisitions and Takeovers Act 1975 (FATA)
Objectives	– Protect national interests
Review criteria	– Adverse implications for national security – Impact on economic development – Consistency with specific foreign investment legislation, including sectoral rules – Implications for government policies, competition, operations of Australian business
Trigger values	– 15% in shares or voting rights for single investors – 40% in aggregate in shares or voting rights for two or more investors
Notification	– Compulsory for significant foreign investment proposals – Compulsory for all investments proposed by foreign governments and their agencies
Review body	– FIRB reviews and advises – The Treasurer takes final decision
Sectoral focus	– No sectoral focus
Documentation	– Specified on case-by-case basis
Duration	– 30D review by The Treasurer
Appeal	– No
Possible decisions	– Approval – Conditional approval – Decline
Other legal provisions	– Specific foreign investment legislation exists for certain sectors, including transport and telecommunications. – The Treasurer, on Feb 17, 2008, has issued additional Guidelines for Foreign Government Investment Proposals, establishing additional criteria for the admission of investments by foreign governments and their agencies. The six guidelines include: (i) An investor's operations are independent from the relevant foreign government. (ii) An investor is subject to and adheres to the law and observes common standards of business behaviour. (iii) An investment may hinder competition or lead to undue concentration or control in the industry or sectors concerned. (iv) An investment may impact on Australian Government revenue or other policies. (v) An investment may impact on Australia's national security. (vi) An investment may impact on the operations and directions of an Australian business, as well as its contribution to the Australian economy and broader community

Canada	
Process	– ICA review
Legal basis	– Investment Canada Act, 1985
Objectives	– Ensure net benefit to Canada
Review criteria	– Level and nature of economic activity, incl. employment, resource processing, domestic sourcing, exports – Significance of Canadian participation in company and industry – Productivity, industrial efficiency, technological development, innovation, product variety – Competition – Competitiveness on world markets – National industrial, economic, cultural policies
Trigger values	– CAD 295m for WTO investors – CAD 5m for direct investments by non-WTO investors investing in culture, transportation, financial services, production of uranium – CAD 50m for indirect investments by non-WTO investors' investing in culture, transportation, financial services, production of uranium
Notification	– Compulsory
Review body	– Industry Canada, led by Minister of Industry – Canadian Heritage, led by Minister of Canadian Heritage
Sectoral focus	– No sectoral focus – Separate trigger values for investments in culture, transportation, financial services, production of uranium
Documentation	– Information about investor, investment, the Canadian business to be acquired, its assets, investors plan for the Canadian business – Reasons to undertake the investment
Duration	– 45D review – 30D extension – In practice, average 52D for Industry Canada filing, 75D for Canadian Heritage filing
Appeal	– No
Possible decisions	– Approval – Conditional approval – Decline
Other legal provisions	– Ownership restrictions in financial sector – Max. 25% foreign ownership in air carriers – Max. 33% foreign ownership in telecommunications companies – Competition Policy Review Panel mandated to suggest new measures to protect national interests

²⁵ Sources: DB Research, United States Government Accountability Office, national public sources.

China

Process	– Foreign investment review
Legal basis	– 2006 Regulations for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors – Catalogue for the Guidance of Foreign Investment Industries – Various regulations by relevant ministries – Various guiding opinions by relevant ministries
Objectives	– National security and economic interests
Review criteria	– National security – National economic security – Protection of critical industries, as specified in the Catalogue for the Guidance of Foreign Investment Industries – Protection of famous trademarks and traditional brands – In practice, a number of other factors is understood to influence the review process, including negative public attention on relevant officials, bureaucratic infighting, differences in priorities between local and central-level governments, political calendar, regulatory ambiguity, lack of procedural transparency
Trigger values	– Not specified
Notification	– Compulsory
Review body	– Ministry of Commerce
Sectoral focus	– Catalogue for the Guidance of Foreign Investment Industries specifies 67 industries in which foreign investments are restricted, and 34 industries in which foreign investments are prohibited in the areas of farming, fisheries, mining, manufacturing, power, water, gas, communication, transportation, storage, post, telecommunication, wholesale trade, retail trade, banking, insurance, real estate, leasing, commercial services, scientific research, technical services, irrigation, environment, public utilities management, education, public health, sports, social welfare, arts, entertainment, other industries
Documentation	– Not specified
Duration	– Not specified
Appeal	– No
Possible decisions	– Approval – Conditional approval – Decline
Other legal provisions	– Total of more than 200 laws involving foreign investment, including: 2007 Antimonopoly Law, State Council Opinion on Revitalising the Industrial Machinery Industry, Guiding Opinion Concerning the Advancement of Adjustments of State Capital and the Restructuring of State-Owned Enterprises, Equity Joint Ventures Law, Foreign Contractor Joint Ventures Law, Foreign Capital Enterprises Law

France

Process	– Foreign investment review
Legal basis	– Law 2004-1343 – Decree 2005-1739
Objectives	– Public order – Public safety – National defence
Review criteria	– Activities likely to jeopardise public order, public safety or national defence interests – Research in, and production or marketing of, arms, munitions, or explosive powders or substances – Preservation of industrial capacities on French territory (R&D, know-how and other IP assets, production capacity), continuity of supplies, compliance with contractual commitments contained in certain existing contracts (e.g., public procurement contracts or contracts in specific industry sectors) – EU companies: Only those operations leading to the effective transfer of a sensitive activity – Non-EU companies: Full review generally applied
Trigger values	– Review to be conducted if investor acquires “control” of a firm whose corporate headquarters are located in France, acquires a branch of a firm whose corporate headquarters are located in France, or acquires more than one-third of the capital or voting rights of a firm whose corporate headquarters are located in France
Notification	– Compulsory
Review body	– Ministry of Economy, Finance and Employment – Other ministries consulted
Sectoral focus	– 11 sectors as specified in 2005 Decree, including gambling and casinos, private security, research, development, or production of means to stem the unlawful use, in terrorist activities, of pathogens or toxins, equipment designed to intercept correspondence and monitor conversations, testing and certification of the security of information technology products and systems, production of goods or supply or services to ensure the security of the information systems, dual-use items and technologies, cryptology equipment and services, activities carried out by firms entrusted with national defence secrets, in particular under the terms of national defence contracts or of security clauses, research, production, or trade in weapons, ammunitions, powders, and explosives intended for military purposes or war materials
Documentation	– Location where the investor is a legal entity, details on the individuals and public legal entities that have ultimate control over the investing organisation, identity of the primary known shareholders holding more than 5 percent of the capital or voting rights, board members’ names and addresses, identity of the fund manager, if applicable, investment target’s business activity, investment target’s last fiscal year revenues, shareholder structure before and after the contemplated deal
Duration	– 60D limit after receipt of full documentation – Extension possible
Appeal	– Yes
Possible decisions	– Approval – Conditional approval – Decline
Other legal provisions	– National sector-specific restrictions, e.g. in media, finance, aerospace – State monopolies in energy, railway passenger transport, coal mines, explosives, postal services – Issuance of golden shares by government possible – EU Capital Requirements Directive (Art. 19) and Reinsurance Directive (Arts. 19 and 19a) provide for prudential rules for ownership of financial institutions, based on suitability of owner from prudential perspective and financial soundness of acquirer. Based on the criteria, competent authorities (i.e. supervisors) can reject acquisitions of financial institutions in the EU

Germany

(Review process as stipulated by Draft Thirteenth Law Amending the Foreign Trade Act and the Foreign Trade Decree of August 2008)

Process	– AWG foreign investment review
Legal basis	– 2008 Draft Thirteenth Law Amending the Foreign Trade Act and the Foreign Trade Decree – 2004 Amendment to Foreign Trade Act – 1961 Foreign Trade Act
Objectives	– Public order – Public security
Review criteria	– Real and sufficiently great danger to public order or public security that touches upon the fundamental interests of German society – Only applicable to foreign investors from outside the EU and the European Free Trade Association
Trigger values	– 25% of aggregate of coordinated voting rights, direct, indirect holdings)
Notification	– Voluntary
Review body	– Ministry of Economics and Technology – Subject to final approval by Federal Government – Informally, other ministries and services can be consulted on individual basis
Sectoral focus	– No sectors specified
Documentation	– To be specified by Ministry of Economics and Technology
Duration	– 90D for decision to initiate the review process – 60D for conduct of review
Appeal	– Yes
Possible decisions	– Transaction considered approved unless Federal Government decides otherwise within specified time frame – Conditional approval – Decline
Other legal provisions	– Competition Law (<i>Gesetz gegen Wettbewerbsbeschränkungen</i>) – EU Capital Requirements Directive (Art. 19) and Reinsurance Directive (Arts. 19 and 19a) provide for prudential rules for ownership of financial institutions, based on suitability of owner from prudential perspective and financial soundness of acquirer. Based on the criteria, competent authorities (i.e. supervisors) can reject acquisitions of financial institutions in the EU.

India

Process	– FIBP review
Legal basis	– Foreign Exchange Management Act 1999 – Industries Act 1951
Objectives	– National security – Domestic concerns – Cultural concerns – Economic concerns
Review criteria	– “Special circumstances” – Compliance with national policies such as sector equity caps, joint venture approval requirements, industrial licensing requirements – Strategic and defence-related considerations
Trigger values	– Not specified
Notification	– Obligatory notification within 30D of completion of transaction
Review body	– Foreign Investment Promotion Board, composed of the Secretaries of the Department of Economic Affairs (the Chair), the Department of Industrial Policy and Promotion, the Department of Commerce, the Division of Economic Relations within the Ministry of External Affairs, the Ministry of Overseas Indian Affairs
Sectoral focus	– Additional industrial licensing requirements for several sectors, including alcoholic drinks, tobacco, electronic aerospace and defence equipment, industrial explosives, hazardous chemicals, manufacturing plants with capital higher than INR 10 m, certain industrial projects
Documentation	– Varies across sectors
Duration	– 30D limit – 90D on average in practice
Appeal	– Yes
Possible decisions	– Approval – Decline
Other legal provisions	– Press Notes by Department of Industrial Policy and Promotion (DIPP) specify foreign ownership caps at 0%, 26%, 49%, 74%, 100% levels for wide variety of sectors, which apply independent of foreign ownership review process – Various sector-specific restrictions on foreign investments and ownership, including review of investments in the financial sector by the Reserve Bank of India – Caps on investments by institutional investors

Japan

Process	– Foreign investment review
Legal basis	– 1991 Amendment to Foreign Exchange and Foreign Trade Act of 1949
Objectives	– National security – Public order – Public safety – Economic interests
Review criteria	– Threats to national security, public order, public safety, or the economy – Specific, unpublished criteria used to determine when an investment poses a significant threat
Trigger values	– 10% share in listed company – Any share in unlisted company – Establishment of branch, factory, business offices – Change in corporate objectives of companies with higher than 33% foreign ownership – Certain loans to domestic companies
Notification	– Ex-ante mandatory notification for transactions in sensitive industries, with countries with no reciprocal investment agreement, for capital transactions subject to permission by Ministry of Finance, and dual-use items and items used for the maintenance of the defence industrial base – Post-factum mandatory notification in non-sensitive industries within 15D after transaction
Review body	– Ministry of Finance
Sectoral focus	– National security (aircraft, weapons, nuclear power, spacecraft, and gunpowder) – Public order (electricity, gas, heat supply, communications, broadcasting, water, railroads, passenger transport), public safety (biological chemicals, guard services) – Smooth management of the economy (primary industries relating to agriculture, forestry and fisheries, oil, leather and leather products manufacturing, air transport, and maritime transport)
Documentation	– Percentage of shares to be acquired – Business plan of the investing company, and the reason for the transaction – Information related to foreign control, such as the number of foreign board members and the foreign company's reputation
Duration	– 30D limit – 120D maximum extension
Appeal	– Yes
Possible decisions	– Approval – Conditional approval – Decline
Other legal provisions	– Sector-specific restrictions on foreign ownership and management, including broadcasting, telecommunications, tobacco industries

The Netherlands

Process	– No review process
Legal basis	– Financial Supervision Act of 2006
Objectives	– Competition – Financial market oversight
Review criteria	– NA
Trigger values	– NA
Notification	– NA
Review body	– NA
Sectoral focus	– NA
Documentation	– NA
Duration	– NA
Appeal	– NA
Possible decisions	– NA
Other legal provisions	– Mandatory anti-trust review for domestic and foreign investments – Sector-specific rules in financial markets empowering the Netherlands Central Bank to block transactions on grounds of financial stability – Certain sectors publicly-owned and controlled and therefore closed to foreign investments, including electricity and water grids, railway passenger services, national airports, central banking, certain postal and transportation services

Russia

Process	– Foreign Strategic Investment Law (FSIL) review process
Legal basis	– Federal Law on Foreign Investments in Companies Having Strategic Importance for State Security and Defence, No. 57-FZ, as effective from May 7, 2008
Objectives	– National defence – State security
Review criteria	– National defence – State security
Trigger values	– Acquisition of control (>50% share), including appointment of >50 of the board of directors or management board, in a strategic company – Assumption of managing company functions or any other transactions leading to establishment of control in respect of a strategic company – Acquisition by a foreign state, international organisation or organisation under their control of >25 percent or other blocking right in a strategic company – Prohibition on foreign states, international organisations or organisations under their control from acquiring control of a strategic company – Additional restrictions on investment in companies engaged in geological survey or exploration and development of a subsoil area of federal significance
Notification	– Compulsory for investments leading to shares in a company in a strategic sector of 5% or more
Review body	– Federal Antimonopoly Services (FAS) – Final decision taken by a governmental commission, chaired by the Prime Minister
Sectoral focus	– FSIL law specifies 42 sectors considered to have strategic significance for national defence and state security, falling into eight categories: (i) nuclear materials, devices, waste, (ii) coding and cryptographic equipment, (iii) weapons and military equipment and technology, (iv) aviation and space, (v) television, radio broadcasting, printed mass media, (vi) natural monopolies designated as such by the Federal Antimonopoly Service, (vii) telecommunications, (viii) geological survey and exploration and development of subsoil areas of federal significance
Documentation	– Detailed documentation as specified in FSIL law
Duration	– 14D assessment by FAS to initiate the review process – 30D evaluation of the transaction by FAS – 30D review by governmental commission – 180D extension option in unspecified cases – No time specification for national security review
Appeal	– Yes
Possible decisions	– Approval – Conditional approval – Decline
Other legal provisions	– Foreign investments in Russian enterprises are subject to additional rules and restrictions as defined by the following laws: Law on the Subsoil, Law on the Continental Shelf, Law on Joint Stock Companies, Law on Limited Liability Companies, Law on Investigation Activities, Law on Foreign Investments, Antimonopoly Law, Law on Communications

United Arab Emirates

Process	– No review process
Legal basis	– Agencies Law of 1981 – Companies Law of 1984
Objectives	– NA
Review criteria	– NA
Trigger values	– NA
Notification	– NA
Review body	– NA
Sectoral focus	– NA
Documentation	– NA
Duration	– NA
Appeal	– NA
Possible decisions	– NA
Other legal provisions	– 49% cap on foreign ownership in any UAE company, as specified in 1984 Company Law – Foreign companies can import goods into the UAE only via a local agent, as specified in 1981 Agencies Law – Limits imposed by government procurement laws, including the Government Tenders Law – 51% ownership floor on any industrial project, plus citizenship rules for management – Various restrictions on landownership – Various sector-specific limitations, especially 40% cap on foreign ownership in oil and gas-related industries, as well as restrictions in sectors such as telecommunications, insurance, travel services – Preferential treatment for investors from member state of the Gulf Cooperation Council (GCC) – In addition, strong, non-codified, informal restrictions on foreign investments in sensitive industries, including energy, defence, water, power generation, used to further national security, economic, labour-market-related and business interests

United Kingdom

Process	– No formal review process
Legal basis	– Enterprise Act of 2002
Objectives	– Public interest
Review criteria	– Public interest – National interest – Control of classified and sensitive technology
Trigger values	– No trigger values applicable
Notification	– Notification rules of Office of Fair Trading and Competition Commission
Review body	– Secretary of State for the Department of Business, Enterprise and Regulatory Reform (DBERR) makes Public Interest Intervention – Office of Fair Trading reviews and submits recommendations – Competition Commission reviews and submits recommendations
Sectoral focus	– Secretary of State can make Public Interest Intervention, and intervene in any investment transaction, including a transaction only involving British parties, which he considers harmful to the public interest
Documentation	– Specified on case-by-case basis
Duration	– 120D after a Reference has been provided by the Competition Commission
Appeal	– Yes
Possible decisions	– Approval – Conditional approval – Decline
Other legal provisions	– Government golden share and 29.5% cap on foreign shareholding in British Aerospace PLC and Rolls Royce PLC – Foreign-controlled company may not be granted defence procurement contracts – Citizenship requirements for certain companies engaged in classified work – Veto over disposal of assets for certain companies – Restrictions on foreign investment activity in certain sectors. Under OECD Code of Liberalisation of Capital Movements, UK reserves right to restrict foreign investment in air transport, broadcasting, maritime transport – Limitations to OECD National Treatment Instrument in aerospace, maritime transport, government defence procurement contracts

United States of America

Process	– CFIUS review
Legal basis	– Exon-Florio Amendment to the Defense Production Act of 1950 – 2007 Foreign Investment and National Security Act (FINSA)
Objectives	– National security
Review criteria	– Potential national security-related effects on US-critical infrastructure, including major energy assets – Potential national security-related effects on US-critical technologies – Whether the transaction is a foreign government-controlled transaction – Review of the current assessment of (i) the acquiring country's adherence to non-proliferation regimes, (ii) the relationship of the acquiring country with the United States, specifically on its record on cooperating in counterterrorism efforts, (iii) the potential for transshipment or diversion of technologies with military applications, including an analysis of national export control laws and regulations – Long-term projection of US requirements for sources of energy and other critical resources and material – Potential effects of the transaction on sales of military goods, equipment, or technology to any country identified by the Secretary of Defence as posing a potential regional military threat to the interests of the United States
Trigger values	– No trigger values – CFIUS investigation triggered if (I) the lead agency responsible for negotiating mitigation agreements and other conditions and for monitoring compliance with mitigation agreements recommends an investigation and CFIUS agrees, or (II) whenever a review results in a determination that (i) the transaction threatens national security and the threat has not been mitigated, (ii) the transaction is a foreign government-controlled transaction, or (iii) the transaction would result in control of critical infrastructure, CFIUS determines that the transaction could impair national security, and the impairment has not been mitigated
Notification	– Voluntary
Review body	– Committee on Foreign Investment in the United States (CFIUS) reviews and submits recommendation to the president. CFIUS composed of Treasury (chair with other department as lead agency on case-by-case basis), Homeland Security, Defence, State, Justice, Energy, Labor (non-voting), Director of National Intelligence (nonvoting) – The president takes final decision
Sectoral focus	– No sectors officially specified
Documentation	– Specified on case-by-case basis
Duration	– 30D review – 45D investigation – 15D Presidential review
Appeal	– No
Possible decisions	– Approval – Conditional approval – Decline
Other legal provisions	– None

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